161 U.S. 297

TRANSCRIPT OF RECORD.

161-297

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 670. 352

SAMUEL MARKS, HYMAN WOLLENBERG, AND B. J. SIDEMAN, PARTNERS AS MARKS AND WOLLENBERG, APPELLANTS,

vs.

THE UNITED STATES AND THE BANNOCK AND PIUTE TRIBES OR NATIONS OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 26, 1894.

(15,542.)

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1 In the Court of Claims.

SAMUEL MARKS, HYMAN WOLLENBERG, and B. J. SIDEMAN, Partners, Trading under the Name and Style of Marks and Wollenberg, *vs.* THE UNITED STATES and THE BANNOCK and PIUTE INDIANS.	No. 3105. Indian Depredation.

I.—*Statement of Pleadings in this Case.*

The original petition of Samuel Marks and Hyman Wollenberg was filed in this court July 8, 1891. Subsequently, to wit, on the 9th day of November, 1893, an amended petition by the order of court, on motion of claimants, was allowed to be filed as of the date of May 5, 1892, to stand for and in lieu of the original petition, and which is as follows:

2 II.—*Amended Petition in Lieu of Original Petition. Filed as of May 5, 1892, by Order of Court.*

To the honorable the chief justice and judges of the United States Court of Claims:

I.

Your petitioners, Samuel Marks, Hyman Wollenberg, and B. J. Sideman, partners, trading under firm name of Marks & Wollenberg, respectfully represent that they are citizens of the United States and residents of Roseburg, in the State of Oregon, and were throughout the year 1878.

II.

Your petitioners further state that they were the owners of the following-described property, which was taken or destroyed without just cause or provocation on the part of the owners or agents in charge thereof, in or about the month of June, A. D. 1878, in Happy Valley, in the then county of Grant, now Malheur county, and State of Oregon, by the Bannock and Piute Indians, in amity with the United States, to wit:

19 head of horses (geldings) at $100 per head	$1,900
10 yearling colts at $50 each	500
400 head stock cattle of the average value of $23.50 per head	9,400
	$11,800

and the same has not been returned or paid for.

3 III.

Your petitioners further state that the said United States has supervisory charge of the said tribes of Indians and is justly indebted to your petitioners in the sum of $11,800, the value of said property when taken or destroyed or used as aforesaid by the said Bannock and Piute Indians after allowing all just offsets and counter-claims.

IV.

Your petitioners further state that they presented their said claim to the Hon. Commissioner of Indian Affairs, No. 4915, July 27th, 1888, for payment, but the same has not been returned or paid for.

V.

Your petitioners therefore pray that, in accordance with the provisions of the act approved March 3d, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," a judgment may be granted in favor of your petitioners by this honorable court for the amount claimed herein, and for such other or further relief as your petitioners may be entitled to in the premises.

MARKS & WOLLENBERG,
By WM. B. MATTHEWS,
Their Attorney.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

Wm. B. Matthews, being first duly sworn, says that he is attorney of the petitioners, who are absent from the city: that no assignment of the claim set forth in the above petition or any part thereof
4 or any interest therein has been made except as in said petition stated; that said petitioners are justly entitled to the amount herein claimed from the United States, after allowing all just offsets and counter-claims, and that all the facts stated in said petition are true to the best of his knowledge and belief.

WM. B. MATTHEWS.

Subscribed and sworn before me this 25th day of October, A. D. 1893.

GEO. W. TAYLOR, *N. P.*

Claimants' address: Roseburg, Oregon.

WM. B. MATTHEWS,
Attorney for Claimants, Washington, D. C.

5 III.—*Traverse. Filed December* 12, 1892.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. W. COLBY,
Assistant Attorney General.

6 IV.—*Motion to Amend Petition. Filed and Allowed Nov.* 14, 1893.

The claimants move for leave to amend the petition filed herein by inserting in paragraph II, at the close thereof, the following words:

"That the Indians aforesaid were chargeable for said depredation and under an obligation to pay for the same by reason of the provisions of the treaty of July 3, 1868, between the United States and the Shoshone (eastern band) and Bannock tribe of Indians."

WM. B. MATTHEWS,
Attorney for Claimants.
CHARLES & WM. B. KING, *Counsel.*

Allowed November 14, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

7 *Findings of Fact and Conclusion of Law.*

The court, upon the evidence, finds the facts as follows:

I.

The claimants are, and were citizens of the United States on the first day of January, 1878.

II.

In the month of June, 1878, the said claimants were possessed of a ranch in the Grant cañon, Malheur county, State of Oregon, on which ranch they had cattle and horses. In the month and year aforesaid the Bannock and Piute Indians made a raid in and through said county, and in and upon the ranch of claimants, in which raid through said county they destroyed property consisting of horses, cattle, and dwellings, and killed some of the citizens. The Indians numbered between 500 and 600, and were in a body or band moving in concert, having the form of an Indian military organization. The citizens of said county, in consequence of said raid, petitioned the military authorities for protection against the depredations of said Indians.

III.

In said raid the said Indians killed and stole the cattle and horses of said claimants upon the ranch aforesaid. The amount in value of the property taken and destroyed was at the time the sum of $5,450.

IV.

No part of the property included in said amount was returned or paid for. The claim for said property was presented to the Commissioner of Indian Affairs, but no final adjudication thereon has been made. The said taking and destruction of said property were without any provocation on the part of the claimants or their agents in charge of it at the time.

V.

The following are the correspondence and reports in relation to the condition of said Indians before, at, and subsequent to said raid.

8 *Extract from the Report of the Commissioner of Indian Affairs*, 1878.

The outbreak of the Bannocks.

* * * * * * *

Excited by what they heard of the war, irritated by what they esteemed to be bad faith in the issuance to them of scant rations, annoyed by the encroachments of the whites upon their reservation, and cherishing a chronic dislike for the Shoshones, with whom they were associated at Fort Hall agency (the friendly and peaceable character of the latter rather aggravating their hostility to them), they became more and more restless until, during the summer of 1877, a Bannock Indian under the influence of whisky and war paint started out from the agency, armed with Winchester rifle and revolver, and shot and seriously wounded two unoffending teamsters who were passing the agency. On the 23d of November the perpetrator of this deed was arrested and handed over to the civil authorities through the instrumentality of the agent without resistance or opposition. On the same day, as an outcome of the excitement and bitter feeling resulting from this arrest, another Bannock, a friend of the prisoner, shot and killed the agency butcher, Alexander Rhodan.

Troops were immediately called for. On the 20th of December, Colonel Smith, of the Fourteenth infantry, arrived at the agency, and on the 9th of January, 1878, the murderer of Rhodan was arrested by the military at a point some 60 miles distant from the agency; subsequently he was tried and hanged.

The excitement and threatening demonstrations on the part of the Bannocks, consequent upon this arrest, were such that Colonel Smith, re-enforced by cavalry, on the 16th of January surrounded two Bannock villages at the agency and captured 53 warriors with 32 guns and about 300 ponies. The prisoners, except the father and two brothers of the murderer, were released, after admonition by Colonel Smith, and were suffered to return to their people, and in April the captured ponies, being of but little value, were returned to them. The arms, although worthless, were retained. Their best arms had been secreted and their valuable ponies moved

to places of safety before the military surrounded their camp. The failure of this attempt to disarm and dismount the Bannocks served to arouse and exasperate the Indians, and was followed, as the agent predicted that it would be, by retaliation as soon as the grass was in condition to feed the Indian ponies.

CHICAGO, *November* 29, 1877.

General Thomas M. Vincent, assistant adjutant general, Washington, D. C.:

Your telegram of this date received. Information from commanding officer at Fort Hall, forwarded to Washington yesterday's mail, led me to believe the Bannock agent is stampeded. Re-enforcements from Camp Douglas left by rail for Fort Hall yesterday morning. Should arrive today. It seems to me the agent should consult with the commanding officer about disturbances, which he neglected to do.

P. H. SHERIDAN,
Lieutenant General.

FORT HALL AGENCY,
IDAHO, *December* 15, 1877.

SIR: I have the honor to transmit herewith, for your official action, a petition from the resident citizens of this vicinity praying that a sufficient number of mounted troops be stationed here to protect them from the Bannock Indians; also affidavits of Fred. S. Stevens, Joseph Warren, Albert T. Stout, and Charles W. Cline, relative to the hostility of the Bannocks.

* * * * * * *

Very respectfully, your obedient servant,
W. H. DANILSON,
United States Indian Agent.

ROSS FORK, IDAHO, *January* 16, 1878.

Commissioner of Indian Affairs, Washington, D. C.:

Bannock camp surrounded this morning; thirty-two guns and three hundred ponies captured without disturbance; their best guns, ponies, and no pistols could be found. The three companies cavalry from Fort D. A. Russell return on the eighteenth. I recommend that the Bannocks be sent with them and held there until you decide what to do with them. Unless removed, a sufficient military force will be required to keep them in subjection.

DANILSON,
U. S. Indian Agent.

9 HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 1, 1878.

To the governor of Idaho, Boisé City:

Alarming reports have reached here of hostile attitude of Bannock Indians. So far as I can learn, this has been brought about by

Indians firing on two whites whom they had ordered off the Big Camas prairie. It would seem the Indians had looked on the whites as intruders and trespassers. Can you give me any light on the subject, and can you take any measures to allay hostile feeling, to see if the question can be met without an Indian war?

* * * * * * *

McDOWELL,
Major General.

BOISÉ CITY, IDAHO TER., *June* 2, 1878.

Maj. Gen. Irvin McDowell, commanding, San Francisco, Cal.:

The trouble grows out of the claim of the Indians to Big Camas prairie. The present treaty rights I will explain by letter. In addition to the shooting two men, King Hill station, overland road, was raided and horses taken. This indicates a settled purpose. The sheriff of Owyhee telegraphs from Silver City that 150 are raiding on Jordan Valley stage road, without violence as yet, but threatening. I am enjoining caution, and have written Major Collins to avoid collision until inquiry. There is danger of general war.

M. BRAYMAN, *Governor.*

PORTLAND, OREG., *June* 4, 1878.

To adjutant general, division Pacific, San Francisco:

Everything communicated from Boisé confirmed by official reports just received from Bernard and Collins, with additional particulars that Lemhi Indians and others are involved, and that the numbers in the field are at least 500; that a man, and probably a woman, killed, south of Snake river. Several large herds of horses captured, and evident purpose of Indians is to move westward. Have set in motion troops for quickest possible concentration.

HOWARD,
Commanding.

PORTLAND, OREG., *June* 6, 1878.

Adjutant general, division Pacific, San Francisco:

Dispatch concerning Fort Hall received. Will take every precaution. The following from Captain Collins just at hand:

"BIG BEND, SNAKE RIVER, *June* 5.

"Scouts sent yesterday to south of river returned; they went to Bruneau valley; found the people fortified; much property destroyed. One man missing, supposed to be killed. Indians going south towards Juniper mountains; they are believed to be Pah-Utes and Bannocks. All stock about Bruneau valley is taken by the Indians; they are reported to be from 150 to 200 warriors; the command will cross the river today, and will follow their trail. Have four days' rations on their horses, and will be cautious, and

keep close to the Indians. I start to Boisé City today to make some arrangements about supplies.

"COLLINS."

HOWARD,
Commanding.

10 WHITE HORSE, GRANT COUNTY, OREGON, *June* 14, 1878.

Major General McDowell, commanding Pacific coast, San Francisco:

We have had to all concentrate at this place to protect our lives, leaving our homes and property in the possession of the hostile Indians, and for God's sake help us if you can and we will be thankful.

W. J. RAMS.	C. A. MOUNSONE.
D. M. DISSBION.	J. A. CROWLEY.
W. CHRISTROM.	NICK DARNELL.
JAMES BEBY.	R. CAPLY.
E. S. CROSS.	JOHN DIXON.
A. CRAIN.	W. B. TODHUNTER.
JAMES SHORT.	W. P. MOULDEN.
A. DENRAH.	J. F. ABBOTT.
MATE WHITISCO.	J. S. DUAMY.
D. H. DAVIDSON.	J. S. DRISCOLI.
O. ABBOTT.	R. M. DILLDSLL.
G. B. CROWLEY.	J. STREET.
F. PASSONS.	T. W. RITT.

BOISÉ CITY, IDAHO, *June* 20, 1878.

Colonel Kelton, San Francisco, Cal.:

Your telegram received relative to the number of Indians. I will start in a few moments to join General Howard at Eldorado, about 80 miles from here. I expect to join him tomorrow. I will take your dispatch to him and send in an answer by courier. From best source of information at present there is probably not less than 500 or 600 hostiles together in camp at Stein's mountain. They are reported to have women and children with them. If they escape northward they will probably be joined by Upper Columbia River Indians. Runners have been passing during the winter and spring between the various bands of the Upper Columbias, Umatillas, Malheurs, Piutes, and Bannocks, and other renegade bands in this section. All information leads to the belief that a general uprising is contemplated. General Howard may have particular information not in my possession.

MASON.

Extracts from Report of the Secretary of War, 1878.

Report of Major General M'Dowell.

HEADQUARTERS DIVISION PACIFIC AND
DEPARTMENT OF CALIFORNIA, *October* 24, 1878.

SIR: Absence from duty at my headquarters at the time designated for sending you my annual report, and the failure at this

date to hear from the general commanding the department of the Columbia, prevent me from making this report as full as I wish, and will make it necessary to send you a further report as soon as I get one from General Howard.

I transmit herewith the following papers concerning this department and the division of the Pacific, viz: Annual report of the chief quartermaster; annual report of the chief commissary of subsistence; annual report of the medical director; annual report of the engineer officer; a statement of the movement of troops to and from the department since my last report.

I also send copies of all the telegrams and orders issued in relation to the hostilities commenced at Big Camas Prairie, Idaho, last May, and which spread all over Idaho, northern Nevada, and Oregon, commencing with the Bannocks, and involving the Pi-Utes, Snakes, and affecting the river tribes to the south of the Columbia river, and causing great anxiety for fear the trouble might extend to the larger tribes to the north of the Columbia.

I will, as I have before said, defer till I get General Howard's report, going into the question of the movement of troops under his command.

11 In order to not have to call on the general of the army for troops from the eastern commands—being warned not to do so save in an extremity—I sent to General Howard all the troops from the department of California, save a handful at Alcatras, and called on the department of Arizona for every man that could be made available, even at the risk of having trouble in that department.

The campaign lasted till late in the summer; was a very fatiguing one, and caused much loss of life and property to the inhabitants, the troops, and the Indians. The latter have been subdued, and now await the action of the proper authorities as to their future.

I have the honor to be, very respectfully, your most obedient servant,

IRVIN McDOWELL,
Major General, Commanding Division and Department.

The Adjutant General, Washington, D. C.

VI.

The owners of the stock alleged to have been lost were H. Wollenberg, S. Marks, and B. J. Sideman. Their partnership was dissolved in 1879 or 1880, after the commission of the alleged depredation.

VII.

From these facts, the court finds the ultimate fact, so-far as it is a question of fact, that the tribes or bands of Piute and Bannock Indians were not in amity with the United States at the time the depredations complained of were committed.

Additional Findings Given at the Request of the Claimants.

VIII.

The following opinion was rendered in the Interior Department for the guidance of that department in the consideration and allowance of Indian depredation claims under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885 (23 Stat. L., 376), and subsequent acts, and was followed by the Interior Department in its decisions under these acts.

12 DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
WASHINGTON, D. C., *August* 23, 1886.

Hon. H. L. Muldrow, Assistant Secretary of the Interior.

SIR: I have considered the matters presented by the letter of the Assistant Commissioner of Indian Affairs, of August, 1886, upon which I respectfully submit the following opinion:

In the letter referred to, the Assistant Commissioner of Indian Affairs submits for legal interpretation and advice the clause in the appropriation acts of March 3, 1885, and May 15, 1886, providing for the investigation and examination of certain Indian depredation claims, the text of which is fully set forth in his letter, to which reference is hereby made, and asks that in construing said acts, special reference be had to the following questions, to wit:

"1st. What class of depredation claims is entitled to be investigated under this act?

"2d. Does it provide for claims in favor of citizens of the United States, on account of depredations committed, other than those chargeable against Indians by reason of treaty obligations?

"3d. Are claims filed since the passage of the act provided for?

"4th. Does it require that the special report of the office on each claim shall make a reference to the date and clause of the treaty creating the obligations for payment?

"5th. Are there any provisions made in said act for the disposition of claims in favor of citizens, on account of depredations committed by Indians holding no treaty relations with the United States at the time of the commission of the injury?

"6th. Under existing laws does any liability attach to Indians on account of depredations on citizens, except as provided by treaty stipulations?"

13 Section 17 of the trade and intercourse act of June 30, 1834, provided for indemnity to persons whose property has been destroyed by Indians belonging to tribes in amity with the United States, under certain circumstances therein named, and by the said section the United States guaranteed to the party so injured an eventual indemnification. Said section further provided that if

the nation or tribe to which such Indians may belong receive an annuity from the United States, that such claim may be deducted therefrom and paid to the party injured, and if no annuity is payable to such tribe or nation, then the amount of such claim should be paid from the Treasury of the United States. It further provided that *that* unless such claim be presented within three years after the commission of the injury, the same shall be barred.

The act of February 28, 1859, provided for the repeal of so much of the act of June 30, 1834, as provided that the United States shall make indemnification out of the Treasury for property of citizens taken or destroyed by Indians, but contained a proviso that nothing in that act should be construed as to impair the obligation of the Indians to make indemnifications out of the annuities as prescribed in said act.

This modification of the act of 1834 released the Government from all liabilities for such claims, but preserved the power to retain annuities for the purpose of making indemnification for such depredations.

Section 7 of the act of May 29, 1872, provided that it shall be the duty of the Secretary of the Interior to prepare and publish rules and regulations prescribing the manner of presenting claims arising under existing laws and treaty stipulations for compensation for Indian depredations and the degree and character of the evidence necessary to support such claim-. He was required to investigate such claims and report to Congress the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based.

The law then in force was incorporated in the Revised Statutes as section 2156, except that the bar provided by the act of June 30, 1834, was omitted from section 2156, and hence was also re-
14 pealed. There is, therefore, no statutory bar applicable to claims for depredations committed since the adoption of the Revised Statutes.

In his opinion of December 10, 1885, the Assistant Attorney General, construing the act of March 3, 1885, with reference to class of claims authorized to be investigated under said appropriation, said:

"In thus providing for the investigation of 'all such claims as are pending,' the fair presumption seems to be that Congress had reference only to living subsisting claims, and not claims which were barred by the statute of limitations, and were therefore no longer claims in a legal sense.

"My conclusion therefore is that in order to entitle any claim for Indian depredations to be investigated in pursuance to the provisions of the act of March 3, 1885 (23 Stat, 376), such claims must either have originated since the Revised Statutes repealing the three years' limitation of 1834 went into operation; or else, if it originated before that time, it must have be- presented 'within three years after the commission of the injury' which constitutes the basis of said claim."

Concurring in this view, the question then arises, how far has the scope of the investigation provided for by the act of March 3, 1885,

been enlarged by the act of May 15, 1886? This act appropriates the sum of $20,000, "for continuing the investigation and examination of certain Indian depredation claims, originally authorized and in the manner provided for by the Indian appropriation act of March 3, 1885.

The act of March 3, 1885, determines what claims were originally authorized, to wit: "All claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending, but not yet examined, on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, * * * and to report * * * what funds are now existing or to be derived by reason of treaty or other obligation out of which the same should be paid."

As the act of March 3, 1885, only provided for the investigation of "living subsisting claims," that is, such as were not barred by limitation, the act of May 15, 1886, enlarged the scope of that investigation by providing for the investigation of all claims of the character of those originally authorized, including those barred by limitation. To this extent the scope of the investigation provided for by the act of March 3, 1885, was enlarged by the act of May 15, 1886, and no farther, and in all other respects the act of March 3, 1885, determines what classes of claims are to investigated under the appropriation of May 15, 1886.

The question then arises, what claims were revived by this act? The act of March 3, 1885, furnishes the answer: "All claims heretofore filed in the Interior Department, and which have been approved in whole or in part, and now remain unpaid, and also all such claims as are pending but not yet examined in behalf of citizens of the United States chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States."

Answering seriatim the question to which special reference is asked, I am of the opinion:

1st. That the investigation of claims provided for by these acts is confined to such claims in behalf of citizens of the United States as may be chargeable against any tribe of Indians by reason of any treaty between such tribes and the United States, including claims of this character barred by the statute, provided such claims were pending in the department March 3, 1885.

2d. It does not provide for the investigation of claims not chargeable against Indians by reason of treaty obligations.

3d. It does not provide for the filing since the passage of the act of March 3, 1885, of claims barred by the statute at that date, because only such claims as were then pending were revived by the act of May 15, 1886.

I am of the opinion, however, that all claims that were not barred March 3, 1885, are included within the claims to be investigated, although filed after the passage of either the act of 1885 or 1886, because the act of May 29, 1872, and the rules and regulations made in pursuance thereof, require the Secretary of the

Interior to investigate such claims and make report thereof to Congress in the same manner as provided for by the act of March 3, 1885. This act and the rules and regulations adopted by the Secretary, as provided for by said act, is not repugnant to any provision of section 2156, but provides for the enforcement and execution of that section. As no statutory bar attaches to any claim for depredations committed since the adoption of the Revised Statutes, such claims may be filed at any time.

4th. I am of the opinion that the act requires the special report of the office on each claim shall make reference to the date and clause of the treaty creating the obligation for payment.

5th. I am of the opinion that no provision is made in either of said acts for an investigation of claims in favor of citizens on account of depredations committed by Indians not holding treaty regulations with the United States at the time of the commission of the injury.

6th. In view of the opinion expressed upon the foregoing questions, I do not think that an answer to this question is necessary to the determination of what claims are to be investigated under the appropriation acts of 1855 and 1856, and hence have not given this question such consideration as I would desire before expressing an opinion thereon.

Very respectfully,

E. F. BEST,
Chief Law Clerk.

I concur in the foregoing opinion.

D. L. HAWKINS,
Assistant Secretary.

August 25th, 1886.

17 IX.

In making adjudications of claims under said act of March 3, 1885, and subsequent acts, the Interior Department considered and decided upon their merits, claims arising during the disturbances, set forth in findings II and V, among the Bannock Indians, and allowed sixty-one of such claims and disallowed, upon grounds going to the facts applicable to each case, eight of such claims. It does not appear that any of the claims were paid by the United States or Indians. It does not appear that Congress made any appropriation for the payment of the claims allowed by the Interior Department. No case arising during these disturbances was ever disallowed under the said acts by the Secretary of the Interior, nor was jurisdiction under said acts refused or denied by him because of any defect in, or want of, treaty stipulation to render the Indians chargeable for their depredations or because the depredation was committed in time of tribal hostility. In making the allowances the Commissioner of Indian Affairs uniformly referred to section 1 of the treaty of July 3, 1868 (15 Stat. L., 673), as the treaty creating the obligation for payment and the report to Congress by the Secretary of Interior of such allowances, required by the act of March 3, 1885, referred to this treaty as creating the obligation for payment.

X.

In considering Indian depredation claims under the said act of March 3, 1885, and subsequent acts, the Secretary of the Interior and the Commissioner of Indian Affairs uniformly held that claims were authorized to be examined under said acts wherever a treaty appeared with the tribe charged with the depredation, containing provisions the same as, or substantially similar to, those contained in section one of the treaty with the Bannock Indians of July 3, 1868 (15 Stat. L., 673). In the reports of the Secretary of the Interior to Congress such treaties were referred to. Allowances were reported to Congress by the Secretary of the Interior in three hundred and fifty-five cases under said acts (beside the sixty-one cases against the Bannock Indians referred to in finding IX).

In ninety-seven other cases, likewise allowed, the treaties contained similar provisions, promising to preserve peace and to take defined action in case of depredations by Indians belonging to the tribe, but contained no provisions for payment for depredations out of annuity funds.

In two hundred and three other cases, likewise allowed, the treaties contained provisions pledging the tribe to peace and amity or to refrain from depredations, but contained no provision for the course of action of the tribe if hostilities or depredations occurred, or for payment for depredations out of annuity funds.

The total number of claims allowed and reported to Congress under the act of March 3, 1885, and subsequent acts, as aforesaid, was nine hundred and fifteen.

18 XI.

No claims where such treaties appear, as set forth in the preceding finding, were disallowed or jurisdiction thereof refused or denied by the Secretary of the Interior under the act of March 3, 1885, and subsequent acts, because of any defect in, or want of, treaty stipulation to render the Indians chargeable for the depredation.

XII.

No discrimination was made by the Secretary of the Interior or the Commissioner of Indian Affairs in examining and adjudicating Indian depredation claims under the act of March 3, 1885, and subsequent acts between claims arising when the tribe charged with the depredation was in an actual state of peace and claims arising when the tribe was not in an actual state of peace.

XIII.

The annual reports to Congress by the Secretary of the Interior under the act of March 3, 1885, and subsequent acts were printed in the regular series of executive documents and were on the files of both Houses of Congress. They contained references to the treaty in each case creating the obligation for payment. The papers in each case, with the report of the Commissioner of Indian Affairs and

the decision of the Secretary of the Interior, were transmitted to Congress with these annual reports and placed on the files of the House of Representatives.

Additional Findings Given at Request of Defendants.

XIV.

The claims allowed by the Secretary of the Interior were by him reported to Congress; but Congress has refused to make such payments, and no claim allowed by the Secretary of the Interior in any case where the treaty was identical with or similar to the treaty with the Bannock Indians, or where the Indians committing
19 the depredation were at the time at war with the United States, has ever been paid.

XV.

Congress has refused to pay depredation claims where the tribe charged was at war with the United States, on the ground that "these losses were incident to a state of war with savage tribes." (House Report No. 932, Twenty-fifth Congress, second session; House Report No. 1028, Twenty-fifth Congress, second session.)

The court makes the following amendments to its findings February 12, 1894:

The second finding is amended as follows: Strike out at end the words "the military operations which ensued are attached to finding V" and insert as follows: The history of the military operations which ensued are set forth in finding V and the additional findings given at the request of the Attorney General.

20 The following documents are official records filed in the case by the defendants, and, at their request, are to be certified to the Supreme Court on appeal as part of the transcript of the record of the case:

ROSS FORK, IDAHO, *June* 6, 1878.

Commissioner of Indian Affairs, Washington, D. C.:

Nine hundred and eighty Indians here, mostly Shoshones, engaged in farming. Most of the Bannocks have left the agency. Have seen by papers they are committing depredations in Camas prairie and vicinity, one hundred and fifty miles west of agency. A Shoshone has just come in from them and confirms newspaper reports. Indians here are very much excited. One officer and twenty-five soldiers here; need more troops. Will keep you advised of situation.

DANILSON, *Agent.*

In the light of succeeding events it is evident that neither the military officers at Fort Hall nor General Crook, who made a visit to Fort Hall for the purpose of ascertaining whether the troops ought to remain there or not, nor General Sherman, who thought

*XXI

unfavorably of the agent because he wanted troops to remain at the agency, had a true appreciation of the effect which the unsuccessful attempt to capture arms and ponies would have upon the Indians. Notwithstanding the fact that against their will one officer and twenty-five men were left at the agency, the Indians broke out in hostilities, as the agent said that they would, as soon as the grass was in good condition for their ponies to travel. The long chase after these Indians is a matter of record, and as, with the history of the war, it more properly belongs to the War Department to set it forth, suffice it to say that under the vigorous campaign of General O. O. Howard the war begun in June was ended by the last of August, and the survivors of the hostile bands, either by capture or surrender, were held as prisoners of war. General Howard reports their number, in men, women, and children, to be about 1,000. Rep. Sec'y Int., 1878.

OMAHA, NEBR., *September* 9, 1878.

"Major Upham, commanding Camp Brown, telegraphs as follows:

"'Dick Washaki's son, just in from Clark's fork, brings account of a successful fight of a detachment of infantry and Crow Indians with about twenty lodges of hostile Bannocks. Fight occurred on the morning of the 5th instant, on Clark's fork, the troops killing a good many horses—mostly stolen Americans—and all the squaws and children. One uncommissioned officer, one citizen, and one Crow killed, and one soldier wounded. Ploqua, Bannock chief, among the captured.'

"R. WILLIAMS."

I also send copies of all the telegrams and orders issued in relation to the hostilities commenced at Big Camas prairie, Idaho, last May, and which spread all over Idaho, northern Nevada, and Oregon, commencing with the Bannocks, and involving the Pi-Utes, Snakes, and affecting the river tribes to the south of the Columbia river, and causing great anxiety for fear the trouble might extend to the larger tribes to the north of the Columbia.

* * * * * * *

In order to not have to call on the general of the army for troops from the eastern commands—being warned not to do so save in an extremity—I sent to General Howard all the troops from the department of California, save a handful at Alcatras, and called on the department of Arizona for every man that could be made available, even at the risk of having trouble in that department.

The campaign lasted till late in the summer; was a very fatiguing one, and caused much loss of life and property to the inhabitants, the troops, and the Indians. The latter have been subdued, and now await the action of the proper authorities as to their future.

I have the honor to be, very respectfully, your most obedient servant,

IRVIN McDOWELL,
Major General, Commanding Division and Department.

The adjutant general, Washington, D. C.

21 (Telegram.)

PORTLAND, OREG., *June* 3, 1878.

To adjutant general, division Pacific, San Francisco:

Report from citizens of Boisé. Indians raiding overland road, seventy miles south of Captain Collins' camp at Big Camas prairie. Have destroyed King Hill station, several ranch buildings, Glenn's Ferry, burned Eli and Watkins' freight wagons, stolen over one hundred horses. Indians on the war path surely. Families fleeing and fortifying. Edward Paine sends following: "Paine's Ferry, June 1. Five families came here for protection last night. Expect assistance from Boisé City to hold this place. This is the stage ferry, thirty miles above Glenn's, the only one left on the river. Heavy teams are on the road. Can get fifty men to hold the place if we can arm them. They ask for order on Lieutenant Patten for fifteen (days?) rations and supplies. They will start tomorrow if they get the supplies." They report further: Twenty citizens of Rocky Bar, under Sheriff Campbell, joined Captain Bernard; twenty-five more, under G. A. Parson, have joined Captain Collins. Governor Brayman sends similar information, adding the right to Big Camas prairie is evidently the cause. Am not yet satisfied as to disposition of Buffalo Horn. I will continue concentrating at Boisé adequate force unless otherwise directed.

HOWARD,
Commanding Department.

Received at headquarters military division Pacific and department of California June 2, 1878. Telegraphed to general of the army June 3, 1878, adding that companies D and I, First cavalry, had been ordered to Camas prairie, and that five companies of infantry were in readiness, should they be required. General Howard telegraphed about the movement of troops, and informed that his dispatch had been forwarded to Washington same date.

(Telegram.)

CHICAGO, ILL., *June* 4, 1878.

To General Irvin McDowell, San Francisco, Cal.:

I am in receipt of your dispatch of yesterday, and have directed General Crook to send to Fort Hall all the troops he can from Salt Lake and stations on the Union Pacific railroad. The force will be very small, but it is all we have. I will inform you of its strength.

P. H. SHERIDAN,
Lieutenant General.

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 6, 1878.

To General Sherman, Washington, D. C.:

In the regiments which may participate in the Bannock campaign one hundred and thirty-two recruits are required. I ask that in-

stead of sending raw recruits to these regiments while in the field that I be authorized to enlist not exceeding that number of Indian scouts from the Warm Springs or Nez Percés, if required.

The number of Indian scouts in this division has been reduced to one hundred, all of whom are in Arizona. General Howard has asked for twenty-five.

McDOWELL,
Major General.

(Telegram.)

PORTLAND, OREG., *June* 9, 1878.

To adjutant general, military division Pacific, San Francisco:

Following just received from Collins, Boisé, dated today: "Just shown the following addressed to Governor Brayman: Yesterday afternoon Harper's company volunteers came across about sixty Bannock Indians seven miles east of South Mountain, who attacked him; was compelled to retreat, Indians following seven miles, killing four white men and two Piute scouts, wounding Thomas Bones, also one man missing; several horses killed and wounded. Harper expects re-enforcements early this morning, then will return to scene and recover dead. Hills full of hostile Indians; need men and arms at once. Show to Major Collins." General Howard telegraphs following today from Walla Walla: "Reports from Wheaton represent some Bannocks appearing in neighborhood of Salmon river and people fleeing to Mount Idaho; reconnoitering parties have been drawn in. I expect to leave this afternoon for Boisé, after Wheaton comes here."

SLADEN, *Aide.*

Received at headquarters military division Pacific and department of California June 10, 1878.

22 (Telegram.)

CAMP MCDERMITT, NEVADA, *June* 9, 1878.

To assistant adjutant general, department California, San Francisco:

Abbott, postmaster at, and Burns, citizen, near, Alvord, Oreg., sent in an Indian runner reporting that Bannocks at Malheur reservation had captured all the arms there and were going to burn the houses and take stock. They ask for guns. I replied I had none to spare. They say Natchez has gone to reservation and Chief Winnemucca is at Juniper lake, northwest of here, near Stein mountains. Piutes seem to be peaceably inclined. Tomorrow I will send out a runner to find Bernard (if Indian does not disappoint me) and inform him of your message of yesterday, received today, which I have also telegraphed to Silver City to Von Schrader for him to communicate with Collins at Boisé and try to reach Bernard, whose whereabouts are unknown; supposed to be in Bruneau valley. Von Schrader says the chances of getting to him are desperate, and that Owyhee volunteers have been fighting Bannocks in Jordan valley. Five white men missing and Indians victorious.

Piutes are coming back in here in small numbers; say they are afraid to stay out, and will help us. Two have promised to go out for me tomorrow and watch the Bannocks and keep me informed. I do not know whether they can be trusted or not, but will try them and send them out if they keep their promises to go. Have no good maps sufficiently in detail; would like to be supplied. No serviceable horses here; I may need some.

THOMPSON,
Captain 12th Infantry, Commanding.

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 10, 1878.

To operator, Kelton:

Send following dispatch to Major Sanford:

"Egbert, with five companies, leaves Carlin tomorrow for Duck valley, north of the East fork of the Owyhee, between Bruneau creek and Blue creek. Bernard has been there, is probably now escorting fugitives to Mundy's Ferry on the Snake river, and will then return and ascertain the best point for troops to assemble. The hostiles, sixty in number, have been met on the 9th instant by the Idaho volunteers seven miles southeast of South mountain, near the forks of Battle creek. Lost two men.

"KELTON,
"*A. A. General.*"

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 12, 1878.

To Captain Egbert, Winnemucca, Nev.:

The division commander directs that you proceed with your command to Carlin, to which place Captain Byrne, with three companies on special train, is en route. You will take command of the five companies and proceed north through Cornucopia to Duck valley between Blue creek and Bruneau creek. Commanding officer McDermitt and Major Sanford informed.

KELTON, *A. A. G.*

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 12, 1878.

To commanding officer, department Arizona, Prescott, Ariz.:

The Indian difficulties in Idaho make it suddenly necessary to call upon your department for troops. The division commander directs Companies A and K—Brayton's and Worth's—Eighth infantry, or any other two companies of that regiment which can

soonest move, to come to Angel Island equipped for field service. Laundresses and impedimenta to follow after. Arrival of companies to be reported from Yuma. Furnish transportation for knapsacks.

KELTON, *A. A. G.*

23 (Telegram.)

BOISÉ CITY, IDAHO, *June* 12, 1878.

Assistant adjutant general, military division, San Francisco, Cal.:

Arrived here this morning. Send force under Grover, including Sanford, to clear up scattering Indians toward Fort Hall. Please ask commanding officer Fort Hall to work toward Grover to detain the Bannock families reported going to Hall, principally relations those on war path. I am concentrating against Bannocks and Malheurs, near Sheep Ranch, six miles from Owyhee Ferry, on Winnemucca wagon road, taking charge of this column myself. Ten citizens and four friendly Indians altogether, from the first outbreak, killed. I think the Lemhi and the friendly Bannocks are working homeward. Buffalo Horn is leading the hostiles. Weiser's Piutes and Bannocks furnish the malcontents now raiding. Difficulty began by a drunken Indian; then Buffalo Horn said, as Captain Bainbridge would hold full tribe responsible, they might as well go to war at once, taking horses and other property. Should there be real outbreak in Wheaton's district, please communicate both to him and me, to avoid delay. Shall probably need no more troops this way, so the five hundred reserve at San Francisco, in case of imperative need, could go to Wheaton. Governor Brayman authorizes Bainbridge to use his arms for citizens, should necessity require.

HOWARD,
Commanding.

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 12, 1878.

General Howard, Boisé City, Idaho:

Dispatch just received. No reserve of troops here. Egbert, with five companies of Twelfth infantry, left Carlin yesterday en route for Duck valley, via Cornucopia, to which point there is telegraphic communication. Egan, with two companies of Fourth artillery, has just left here for McDermit, via Winnemucca, and will escort ordnance and subsistence to Boisé. Three companies Eighth infantry are en route for Angel Island. Camp McDermit and all troops en route to you from here are under your orders. Your message sent to commanding officer Fort Hall.

KELTON, *A. A. G.*

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 13, 1878.

General Howard, Boisé City, Idaho:

Your telegram of June 12, asking authority to accept the services of volunteers sent to War Department. You are to understand that all the available companies in and near San Francisco have been sent to operate against the hostile Indians, and will come under your command, as detailed in telegram of Colonel Kelton of 12th instant. I don't want you to be under any misapprehension in this respect. Bear in mind that, except some three small companies on the way from Arizona, you are not to calculate on any more force from here. The Arizona companies are a long ways off.

McDOWELL,
Major General.

TAYLOR'S RANCH, NEV.,
NEAR TUSCARORA, *June* 14, 10 p. m., 1878.

SIR: I have the honor to inform you that, in obedience to General Howard's order, I start in the morning by forced marches to Gussman's ranch, 112 miles from here and 74 from mouth of Bruneau river, expecting to be there at Tuesday noon, for the purpose of cutting off the Bannocks coming south.

I expect to report tomorrow night again from Bull Run creek, via Cornucopia, by courier as directed, after which I may be unable to do so for some days.

I am, sir, with great respect, your obedient servant,
HARRY C. EGBERT,
Captain Twelfth Infantry, Commanding Battalion.

Colonel J. C. Kelton, assistant adjutant general.

Headquarters military division Pacific and department of California.

Received headquarters military division Pacific and department of California June 18, 1878.

24 (Telegram.)

SHEEP RANCH, OREGON, *June* 15, 1878.

Assistant adjutant general, military division Pacific, San Francisco, Cal.:

Your dispatch received. Sarah Winnemucca has just come in. Reports Piutes held as prisoners in hostile camp. She with a few escaped. From her and other information confirmatory have modified plans. Enemy seems to be concentrated in large force near Stein's mountain. Grover, the center, with Sanford, Bendire's, Sumner's, and Carr's companies, cencentrates at once at Keeney's Ferry to move in direction of Stein's mountain. Stewart, the right, push-

ing rapidly to Rinehart's crossing, Malheur; Egbert, reserve, ordered to move with utmost speed to Camp Lyons. Orders sent McGregor to move from Harney to join Bernard; Bernard, with Whipple's, Bomus', and his own company, moves tomorrow on Indian trail. I will go from here to Rinehart's crossing of Malheur to meet Stewart. Egbert reports five companies, 130 men. Stewart's column, D and G Fourth artillery; B, D, G, H, and I, Twenty-first infantry, 13 officers, 200 men; Captain Cochran with his Company F, Second infantry, with Lieutenant Drury, will go to Camp Lyons to await Egbert. Will send only scouts towards Fort Hall.

HOWARD,
Commanding.

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
SAN FRANCISCO, *June* 20, 1878.

To General W. T. Sherman, Washington, D. C.:

Your telegram of today received. Impossible to tell at this time how imperative the necessity for another regiment. How far the Indian hostilities may extend and how long they may last is mere conjecture. What I want right now is more Indians as auxiliaries. Your telegram of 7th instant authorized the enlistment of Indians as soldiers. If you will authorize me to engage that they may be discharged at the expiration of six months, if they desire it, and sooner if we do, and allow me to have them as part of the general service, to the extent of the vacancies now existing in my division, I can get 200 who will be available at once, at less cost and far more effective than any recruits that could be sent. My division is 232 men under the number authorized by law. As to another regiment, will confer with Howard and report as soon as possible.

McDOWELL,
Major General.

(Telegram.)

OTIS CREEK, OREG., HARNEY ROAD,
VIA BAKER CITY, OREG., *June* 24, 1878.

My advance, under Bernard, overtook and attacked hostiles yesterday, Sunday morning, nine a. m. Surprised and charged camp; formed and recharged. Enemy rallied. Bernard asks for reinforcements. Have pressed every man with utmost speed to his and enemy's position on Curry creek, near Camp Curry, 45 miles from Harney.

Egbert will intercept stragglers eastward, and be in readiness for a rapid move in any direction. Nearest troops, at Harney, have been started, and I move from here at once to Bernard. Bernard reports verbally only one soldier reported killed at time messenger left. Bernard has four companies of cavalry—his own, Whipple's, McGregor's, Perry's under Bomus. My aid, Lieutenant Wilkinson, with Sarah Winnemucca as guide, made a quick journey to Harney,

arrives simultaneously with Bernard, and now returns with this report, having ridden 200 miles since they left me at Glenn's store. Please notify Sladen, aid, Portland, Oreg. Buffalo Horn was killed in the charge.

HOWARD,
Commanding.

"'BAKER CITY, *June* 30—9.30 p. m.

"'Courier arrived from Camp Harney this evening; brought no news except that General Howard is supposed to be near the South fork of John Day's river. This tallies with report brought in by citizen courrier, who rode from Canyon City to this place in twelve hours, using but one horse, arriving here this a. m., asking Government aid for citizens of John Day's valley. He states that fifteen citizen scouts attacked Indians, number unknown, on South fork of John Day's river; were surrounded, and still fighting. Also that Indians were pouring into John Day valley. Soldiers, supposed to be General Howard's command, in pursuit.

"'FERREN, *Operator.*'"

25 (Telegram.)

PORTLAND, OREG., *July* 7, 1878.

Adjutant general, division Pacific, presidio San Francisco:

Governor Chadwick telegraphs from Umatilla, dated today:

"Two scouts arrived from General Howard, who was twenty miles from Camas prairie yesterday morning and moving on. Throckmorton's company is also near Camas prairie, where Indians are reported in force, scouts say about one thousand. Mason, inspector, says trail indicates twelve hundred horses."

Another dispatch from governor, as follows:

"Volunteers under Captain Sperry were defeated at Willow Springs, thirty miles south of Pendleton, yesterday. Captain Sperry and nearly all his command killed or wounded. We can hear of but seven left. Am trying to remove large number of families to place of safety down the river. Indians still sixty miles south of this point."

Captain Worth's command will be first sent above Wallula to seize large number canoes and boats held by Homily's band, which is encamped on Columbia, near mouth of Snake. Citizens of Portland have organized a company to start tomorrow to report to Wheaton, taking guns of militia. They make requisition for caliber fifty ammunition. As I am temporarily in charge arsenal during Kress' absence I will issue, if not ordered otherwise, there being little or none of that caliber in the field. Wheaton anxious for those men to guard important points on river, including Celito, where clothing and subsistence have been sent for General Howard's command.

SLADEN, *Aid.*

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
PRESIDIO SAN FRANCISCO, CAL., *July* 7, 1878.

Mr. Towne or Mr. Corning, Palace hotel or C. P. R. R. office, San Francisco, Cal.:

Captain Egan, with a command of four companies, has arrived at Winnemucca en route to this city, thence by steamer to the Upper Columbia. They report on cars, but cannot leave till morning. If this command can be dispatched tonight, it is most important
*168. that it come on. A steamer is in readiness to leave on Tuesday morning with it. A delay of a few hours in this small command reporting to General Howard may be to him and the country of great consequence.

KELTON, *A. A. G.*

(Telegram.)

HEADQUARTERS MILITARY DIVISION PACIFIC
AND DEPARTMENT OF CALIFORNIA,
PRESIDIO SAN FRANCISCO, CAL., *July* 8, 1878.

General Sherman, Washington, D. C.:

Following dispatch just received from Lieutenant Sladen, aid-de-camp, dated Fort Vancouver: "Dispatch from Kress, dated Umatilla, today, says: 'Left here at 2 a. m. for Long Island. Thirteen miles below a party of hostile Indians passed from left to right bank of Columbia river after we passed that point at daybreak. They had about five hundred horses, three hundred of which crossed, and about twenty Indians. Think the party numbered forty or fifty. Captured and destroyed entire camp outfit, property, canoes, &c. Came up for rations; will return at once. Major Worth's command left at 6 this morning.'"

I have had Egan's and Smith's companies, Fourth artillery, Thompson's, Twelfth infantry, Wells', Eighth infantry, come by forced marches from Camp McDermitt to Winnemucca. They arrived at latter place last night; will come by rail today, and leave by steamer tomorrow for the Columbia. Corliss' company, Eighth infantry, just in from Camp McDowell, via Yuma, goes with them; all under Major Mizner, Eighth infantry.

McDOWELL,
Major General.

26 (Telegram.)

HEAD OF BIRCH CREEK,
VIA WALLULA, *July* 9, 1878.

A. A. general, military division Pacific, San Francisco, Cal.:

Yesterday, at Pilot Rock, I formed junction with the troops Wheaton had ordered to meet me under Throckmorton. It being uncertain from conflicting reports whether the main body of the hostiles was near the head of Butter creek or nearer the Columbia

crossing, I sent two excellent scouts to place their camp, and at sunrise moved two columns, one under Throckmorton, consisting of two companies of artillery, one of infantry, and a few volunteers, which proceeded by the stage road directly to Butter Creek post-office; the other column, consisting of seven companies First cavalry as a battalion, under Bernard, severally commanded by McGregor, Whipple, Bendire, Winters, Parnell, Ward, and Bomus, with about twenty of Robbins' scouts and a Gatling gun. I accompanied Bernard's column. We had proceeded some three miles toward the headwaters of Butter creek when we met the two scouts, who reported the Indians in force on a height about three miles from us.

Bernard, taking the trot, moved quickly into position over three troublesome foot-hills, the last of which is fenced by a cañon and over a mile in the ascent. The cavalry sped from hill to hill, till in the vicinity of the enemy strongly posted on a rocky crest. All the companies except McGregor's, with the pack train, were deployed and used during the engagement. The advance was made along several approaches in a handsome manner, not a man falling out of ranks. The different sides of the hill were steeper than Missionary ridge; still the troops, though encountering a severe fire that emptied some saddles and killed many horses, did not waver, but skirmished to the very top, the enemy advancing his position and running to the next height in rear, slightly higher and specially crowned with natural defenses of lava rock. In twenty minutes height was charged from different sides and taken.

Then commenced a rapid pursuit of flying Indians, who abandoned their spare horses that were on the field, perhaps 200, mostly jaded and worthless; also provisions, ammunition, and camp materials. The hostiles struck for the thick pines which crest the Blue Ridge and again made a stand, using the trees for defenses. Again the cavalry pressed them in front and on the flank, and in a few moments dislodged them a third time and pushed them four or five miles farther in the mountains. The rough country and the great exhaustion of horses and men caused a cessation of the pursuit for today. In the battle 5 enlisted men were wounded and probably twenty horses killed. The enemy's loss in killed and wounded is difficult to tell. Their women and children and best horses in drove were well out of the way before the battle began, seemingly toward the Grande Ronde. The flight is in that direction. Captain Bernard is entitled to special credit for this engagement, as indeed for the entire campaign, and his officers and men have done as well as brave and true men can do. Could you know the difficulties of this wilderness you could then appreciate their loyal service.

HOWARD,
Brigadier General, Commanding.

(Telegram.)

FORT VANCOUVER, WASH., *July* 12, 1878.

Following just received:

WALLULA, *July* 12.

"Hostiles after Monday's battle turned north and eastward along Blue Ridge, crossed Meacham's road in the night; Sanford's three (3) companies of cavalry and Miles's infantry is to follow. Egbert operates from Baker City, guarding against returns by trails between him and Piute lakes. Bernard's, now Forsyth's, moves with six companies cavalry northward toward Lewiston. I am en route to Lapwai, Mount Idaho, and vicinity with infantry force to head the enemy at the Snake crossing. Throckmorton is near Pendleton, and will be strengthened by Mizner's companies to quiet an excited populace. Attempts to cross the Columbia by hostiles have ceased. Howard, commanding department."

SLADEN, *Aide.*

(Telegram.)

LA GRANDE, OREG., *July* 16, 1878.

General Kelton, presidio of San Francisco:

Attempted to reach General Howard by stage road; met force on summit of mountain altogether too strong for my command. Will try to cross by Summerville road. No news from other side of mountains.

SANFORD, *Commanding.*

27 (Telegram.)

LA GRANDE, OREG., *July* 20, 1878.

To the A. A. G., military division of the Pacific, San Francisco:

During the week different parts of my command have had eventful combats with the hostiles.

On 13th Captain Miles, with his companies, Twenty-first infantry, Fourth artillery; Captain Bendire's company, First cavalry, and one company of volunteers, charged the Indians near the Umatilla, three hundred or four hundred strong, and drove them several miles. Bernard's cavalry, now under Forsyth, have been pursuing them closely, causing them to abandon most of their plunder and horses; are assisted by the Umatillas; have killed between twenty and thirty, taking as many prisoners. Viven, of Egbert's command, has captured as many more. The Indians are being steadily pursued in the woods and mountains. The most of them appear to be fleeing along the route they came. Forsyth's cavalry is now near headquarters Grande Ronde river, following Indians southward.

HOWARD,
Commanding Department.

(Telegram.)

BOISÉ CITY, IDAHO, *August* 10, 1878.

Assistant Adjutant General, division Pacific, presidio San Francisco:

I have now at different points some six hundred Indians, more or less, men, women, and children. The effect of moving those who are not surrendered to the civil authorities for punishment immediately to the Indian Territory, or to some other place where they cannot return to this region, will, I believe, be the best for all concerned. Shall I prepare them for this exodus? Please communicate division commander's wishes as soon as possible.

HOWARD,
Commanding.

HEADQUARTERS DEPARTMENT OF THE COLUMBIA,
IN THE FIELD, CAMP BOISÉ CITY, IDAHO,
August 11, 1878.

Special field orders No. 42. Extract.

* * * * * * *

VII. Capt. Marcus P. Miller, Fourth artillery, commanding at Malheur agency, Oregon, after being re-enforced by Company H, Twenty-first infantry, will proceed with his battalion and supplies in charge of all Indian prisoners at the agency to Camp Harney, Oregon. On being relieved at Camp Harney, Oregon, by Capt. Evan Miles, Twenty-first infantry, Captain Miller will disband his battalion, relieve the companies from duty in the field, and proceed with his own company via Portland, Oreg., to the department of California, reporting to the assistant adjutant general, military division of the Pacific and department of California.

* * * * * * *

By command of Brigadier General O. O. Howard:

C. E. S. WOOD,
Aid-de-Camp, Assistant Adjutant General in the Field.

Conclusion of Law.

Upon the foregoing findings the court determined, as a conclusion of law, that the petition be dismissed.

28 VI.—*Opinion of the Court.*

WELDON, *J.*, delivered the opinion of the court:

This is a proceeding under the act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations" (1 Sup. R. S., 2d ed., p. 913). Claimants allege that in the year 1878 they were the owners of a large amount of property, to wit, 29 head of horses and colts, and 400 head of stock cattle in Happy Valley, in the county of Grant, now Malheur county, State of Oregon; that the Piute and Bannock Indians, then in amity with

the United States, took and destroyed said property without just cause or provocation on the part of the owners, and that the claim was presented to the honorable the Commissioner of Indian Affairs, but was not paid or any part thereof.

The findings show that in the month of June, 1878, the claimants were possessed of a ranch in said county and State, on which they had at the time horses and cattle; that at that time the Bannock and Piute Indians made a raid in and through said county and upon the ranch of claimants; that in the raid through said county the Indians destroyed property consisting of horses, cattle, and dwellings; that the Indians at the time of the raid numbered between 500 and 600; and were in a body or band moving in concert having the form of an Indian military organization. In said raid the Indians took and destroyed cattle and horses of the claimants amounting to the sum of $5,450, and no part of the property included in said amount was returned or paid for; that the claim was presented to the Commissioner as alleged and the destruction was without provocation on the part of the claimants or their agent in charge of the property at the time.

The first clause of the act upon which the jurisdiction of this court is dependent is as follows:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department.

And also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject however to the limitations hereinafter provided.

The first question to be determined is, has the court jurisdiction of the cause? the raid having incident to it many of the characteristics of an Indian war.

It is contended on the part of some of the counsel in like cases that it is wholly immaterial as to what was the condition of the Indians at the time of the alleged depredations; and the fact that they were in a state of hostility against the United States does not deprive the court of jurisdiction. On the part of others it is conceded that amity is essential in some cases; but though there be a state of hostility and yet treaty relations existing between the United States and the Indians, the fact of such treaty will justify the court in assuming jurisdiction of a cause and awarding damages because of the depredation. It is contended on the part of the defendants that if a state of hostility existed in fact, that such condition is suffi-

cient to bar the jurisdiction of the court, and that the fact of treaty relations will not justify the court in assuming jurisdiction.

This is the first case tried and decided upon its merits, as litigated in this court. The judgments which have been rendered were upon the second clause of the statute, giving jurisdiction to render judgment in all cases which have been allowed by the Interior Department and which neither party desires to litigate.

The findings show that a state of amity did not in fact exist between the United States and the Indians alleged to have committed the depredation, but it is insisted that under the second division of the second clause of the first section of the act, that we have jurisdiction to determine the controversy on its merits, and give such damages as from the evidence it is shown the parties have suffered. The word amity, as used in the first clause of the first section, is the subject of serious dispute and contention between the counsel.

In the construction of a statute words are to be taken in their ordinary and common acceptance, unless such a construction will do manifest violence to the intention and purpose of the legislature. The word amity is not technical in its character, is not peculiar to a circumscribed subject-matter, and must be construed by the court in its broad and ordinary signification.

The Century dictionary defines the word as follows:

Friendship in a general sense, harmony, good understanding, especially between nations; political friendship, as a treaty of amity and commerce. * * *

These appearances and sounds, which imply amity or enmity in those around, become symbolic of happiness and misery. H. Spencer, Prin. of Psychol.

Synonym.—Friendliness, kindliness, good will, affection, harmony.

29 The court, taking the word in its ordinary and common signification, must conclude, that it intends to indicate a state of peace and good fellowship between the Indians upon the one side and the United States upon the other, and if such a state does not exist, then under that clause of the statute, no jurisdiction is incident to or inherent in the court.

The Supreme Court of the United States, in the construction of an amendment to a railroad charter, said:

But Vattel's first general maxim of interpretation is that "it is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusions—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it." Vattel's Law of Nations, 244. Here the words are plain and interpret themselves. (Ruggles *vs.* Ill., 108 U. S., 534.)

But all these rules are understood to be subject to the qualification that, where the language is free from ambiguity, leads to no absurdity, and hence needs no interpretation, nothing beyond it can

be regarded. (Endlich, Interpretation of Statutes, sec. 27. Ezekiel *v.* Dixon, 3 Ga., 146.)

The findings set forth at length the dispatches and communications of different army officers having in charge the maintenance of peaceable and friendly relations with the Indians which show, that during the summer of 1878, those relations were disturbed to the extent of open hostilities between the United States, the Bannock and Piute tribes. On October 24, 1878, the major general commanding the division and department in which the Bannock tribe was located writes the adjutant general at Washington, "I also send copies of all the telegrams and orders issued in relation to the hostilities commenced at Big Canyon prairie, Idaho, last May and which spread all over Idaho, Nevada, and Oregon, commencing with the Bannocks, involving the Piutes, Snakes, and affecting the river tribes to the south of the Columbia river, and causing great anxiety and fear, the trouble might have extended to the larger tribes north of the Columbia. * * * The campaign lasted till late in the summer, was a very fatiguing one, caused much loss to life and property to the inhabitants, the troops, and the Indians." The inhabitants of the district of country in which it is alleged the depredations were committed petition the Government for protection against the warlike act of the Indians. Those dispatches and reports, in connection with the action of the War Department, clearly demonstrate the want of amity, and establish the condition of actual war so far as that condition can exist between a small tribe of Indians and the United States.

This court has had occasion to determine as to what constitutes a condition of war between the United States and an Indian tribe. In the case of Alire *vs.* United States (1 C. Cls., 238) it is said:

Though there may have been no formal declaration of war by Congress, nor any public official proclamation of its existence by the President of the United States, yet it can scarcely be doubted, from the official acts and recognitions by the President and by Congress of the existing hostility by these tribes, and the means taken to suppress the disturbance and chastise them into submission, there existed that condition of things between the Government of the United States and those tribes known, in common parlance as well as legal enactments, as an "Indian war." In our intercourse and dealings with these savage tribes, regarded in our law as independent and domestic nations, we do not apply the same rules of peace or war that regulate the intercourse and fix the relations between us and foreign independent nations. Though we have had many "Indian wars," it has been but rarely that Congress, in which the Constitution vests the right to declare war and make peace, has enacted or resolved a formal declaration of hostilities against any tribe or tribes. It has been regarded as sufficient that they have by law provided for the protection of our frontier against the attacks of these tribes, and for calling out volunteers to aid the army, leaving the executive department to act according to the emergencies as they arise. And Congress has seldom failed to recognize and ratify such acts by voting appropriations to pay

the troops called out and defray the expenses incident to such expeditions. This case has been no exception to the general rule. And taking into view the actual condition of things in the Territory of New Mexico between the 1st of January, 1855, and the 1st of August, of the same year, with the acts of this Government during that period and subsequently, we cannot say that this was not an "Indian war." There were repeated acts of depredation by the Indians upon the property of the white settlers, many acts of cruelty, murder, and massacre, such as are incident to savage warfare. These were repelled and punished by the forces of the United States under a general officer in command of the department. Volunteers in aid of these forces were called out upon requisitions made upon the civil governor of the Territory, and these were duly organized and mustered into the service of the United States. Expeditions were planned against these Indians, their country invaded, and battles fought against them, and finally a treaty of peace concluded with them.

In the troubles with the Bannock Indians in the year 1878, all the substantial elements existed except the formal treaty of peace that existed between the United States and the Indians in the troubles in the Territory of New Mexico in the year 1885, which were held to constitute a state of "Indian war" within the meaning of the law in the Alire case.

In the case at bar treaty relations did exist between the Bannocks and the United States, and one of the questions for us to determine is, whether the fact of such relation dispenses with the condition of amity as prescribed by the first clause of the section. The court is of the opinion that treaty relations are no equivalent in law to amity, and do not relieve a claimant from proving a state of amity in cases coming within the first clause of the first section of the statute. The statute to which the second clause of the second division of the section is applicable is the act of March 3, 1855 (23 Stat. L., 376) and is as follows:

Indian depredation claims.—For the investigation of certain Indian depredation claims, ten thousand dollars, and in expending said sum the Secretary of the Interior shall cause a complete list of—

All claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid,

And also all such claims as are pending but not yet examined, on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States,

Including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, with a reference to the date and clause of the treaty creating the obligation for payment, to be made and presented to Congress at its next regular session;

And the Secretary is authorized and empowered, before making such report, to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid, and by

what tribe such depredations were committed; and his report shall include his determination upon each claim, together with the names and residences of witnesses and the testimony of each, and also what funds are now existing or to be derived by reason of treaty or other obligation out of which the same should be paid.

The only treaties made between the United States and the Bannock tribe of Indians are the treaties of July 3, 1868 (15 Stat. L., 673), and the one bearing date May 14, 1880 (Laws U. S. Relating to Indian Affairs, 1884, p. 339). It is not necessary to refer to the last-named treaty, as its provisions can have no possible bearing on the question at issue in this case. It relates to a grant to the Lemhi Indians to locate upon a reservation in Idaho belonging to the Shoshones, Bannocks and Sheepeaters of Idaho. The only treaty which we are called upon to construe is the one of July 3, 1868.

31 Among other provisions is the following:

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

The act of 1885 made an appropriation of ten thousand dollars for the investigation of Indian depredation claims and the subsequent acts making appropriations for the same purpose do not differ essentially from the act of 1885.

For the purpose of facilitating such investigation the Secretary of the Interior is directed to complete a list of all claims "which have been approved in whole or in part and now remain unpaid and also such claims as are pending, but not yet examined, on behalf of citizens of the United States on account of depredations committed chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States." Without at present determining the full force of the act of 1885, in the enlargement of our jurisdiction, in cases where amity does not in fact exist, it is sufficient for the purposes of this opinion to state that the claim made in this case does not come within the requirements of the act of March 3, 1885, in belonging to the class of claims required to be listed by the Secretary of the Interior for the direction and control of the investigation contemplated by that act.

The treaty between the United States and the Bannock Indians

provided a mode of procedure upon the part of claimants which would make the Indians responsible by a loss from their annuities; but that condition does not exist in this case. The depredation complained of in this proceeding was not the subject of investigation before the Indian agent, for the purpose of bringing the claim within that provision of the treaty making the tribe responsible by a diminution of annuities, because of a failure to deliver for punishment a wrong-doer.

Upon the whole case, it is the conclusion of the court that the facts found do not bring the case within the jurisdiction of the court authorizing a judgment for the claimants for the amount which they have suffered in consequence of the wrongs inflicted on them by acts of the Indians, and the petition is, therefore, dismissed.

32 VII.—*Judgment of the Court.*

SAMUEL MARKS, HYMAN WOLLENBERG, and B. J. Sideman, Partners under the Firm of Marks and Wollenberg, *vs.* THE UNITED STATES and THE BANNOCK and PIUTE TRIBES OR NATIONS OF INDIANS.	No. 3105. Indian Depredation.

At a Court of Claims held in the city of Washington on the 27th day of February, A. D. 1893, judgment was ordered to be entered in the aforesaid case as follows:

The court, on due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the petition of the claimants, Samuel Marks, Hyman Wollenberg, and B. J. Sideman, partners under the firm of Marks and Wollenberg, be dismissed.

BY THE COURT.

33 VIII.—*Application for and Allowance of Appeal.*

MARKS and WOLLENBERG *vs.* THE UNITED STATES and THE PIUTE and BANNOCK INDIANS.	No. 3105. Indian Depredation.

From the decision of the Court of Claims, rendered in the above-entitled case in favor of the defendants and against the claimants upon the 27th day of February, 1893, the claimants, by their attorney, William B. Matthews, give notice of and make application for an appeal to the Supreme Court of the United States.

WM. B. MATTHEWS,
Att'y for Claimants.

Filed May 22, 1893.

Allowed in open court on the 29th day of January, 1894.

WILLIAM A. RICHARDSON,
Chief Justice.

34 In the Court of Claims.

SAMUEL MARKS, HYMAN WOLLENBERG, and B. J. Sideman, Partners under the Firm of Marks and Wollenberg,	No. 3105. Indian Depredation.
vs.	
THE UNITED STATES and THE BANNOCK and PIUTE INDIANS.	

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 15th day of February, 1894.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 15,542. Court of Claims. Term No., 670. Samuel Marks, Hyman Wollenberg, and B. J. Sideman, partners as Marks & Wollenberg, appellants, *vs.* The United States and The Bannock & Piute Tribes or Nations of Indians. Filed March 26, 1894.

SUPREME COURT, U.S.
FILED
OCT 11 1895
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

SAMUEL MARKS, *et al.*, *vs.* THE UNITED STATES AND THE BANNOCK INDIANS.	No. ~~870~~ 352

Appeal from the Court of Claims.

BRIEF AND ARGUMENT FOR APPELLANTS.

WM. B. MATTHEWS,
Attorney for Appellants.

A. H. AND R. C. GARLAND,
CHARLES A. KEIGWIN,
of Counsel.

AGE PRINTING CO., 8TH AND H STS., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

SAMUEL MARKS, *et al.*, *vs.* THE UNITED STATES AND THE BANNOCK INDIANS.	No. 670.

Appeal from the Court of Claims.

BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT.

The appellants brought suit in the Court of Claims, under the Act of Congress approved March 3, 1891, 26 Stat. at L., p. 851, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," to recover $11,800, the alleged value of certain horses and cattle killed or stolen by Bannock and Piute Indians in June, 1878.

Upon testimony offered by the claimants the court found that the said Indians, at the time and place alleged,

killed and stole cattle and horses belonging to the claimants of the value of $5,450; that no part of the property included in said amount was ever returned or paid for; that the depredation was without any provocation on the part of the claimants or their agents; that the claimants are, and were at the date of the depredation, citizens of the United States; and that the claim had been presented for allowance to the Commissioner of Indian Affairs, but no adjudication had been had thereon (Rec., pp. 3, 4).

Upon evidence filed by the defendants and consisting of extracts from reports of military officers, the court made a finding as follows:

"From these facts, the court finds the ultimate fact, so far it is a question of fact, that the tribes or bands of Piute and Bannock Indians were not in amity with the United States at the time the depredations complained of were committed." (Rec., 8).

And upon these findings the court determined, as a conclusion of law, that the petition be dismissed. (Rec., 26).

Afterwards judgment was entered in accordance with this conclusion, from which judgment the present appeal is taken. (Rec., 32).

Other findings made by the court embody the evidence supposed to bear upon the condition of the Indian tribes and still other findings set out various actions and opinions of the executive officers charged with the examination of this class of claims. (Rec., 4–26). The opinion of the court is transmitted with the record. (Rec., 26).

As the petition of the claimants was dismissed on the

sole ground that the defendant Indians were not in amity with the United States, the question is whether the court below correctly interpretated the pnrase "in amity," as it is used in the Indian depredation act of March 3, 1891, *supra*. The presentation of the evidence upon which the conclusion of the court is based raises the question of the legal sufficiency of that evidence to show that the Indians were not in amity. That this court may properly look to the evidence supposed to support a finding of the Court of Claims and determine whether that evidence, is competent proof of the facts found, is held in

Moore v. U. S., 91 U. S., 270.
U. S v. Clark, 96 U. S., 37.
U. S. v. Smith, 94 U. S., 214, 217.

"When the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, so to frame its findings as to put the doubtful question into the record."

U. S. v. Pugh, 99 U. S., 255.

Citing:

U. S. v. Ross, 92 U. S., 281.
Intermingled Cotton Cases, 92 U. S., 651.
U. S. v. Crusell, 14 Wall., 1.

From the findings of the court it seems that in the years 1877 and 1878 the Bannock Indians became discontented and restless on account, principally, of the shortness of supplies furnished them; that this dissatis-

faction increased for several months, being manifested from time to time by acts of violence toward various white men with whom they were brought in contact; that at various times in the spring of 1878 small bands left the reservation for the sake of obtaining food, until finally the majority of the tribe were absent; that in the month of June, 1878, the absentees began killing white people, after which date the several bodies of Indians carried on a raid over a large area in Idaho and Oregon, which was finally checked by the efforts of troops of the United States; that the troops were more or less actively engaged in suppressing the outbreak until the latter part of August, 1878; and that the Indians were captured and returned to their reservation shortly after the last-named date. In this raid, initiated by Bannocks, a number of Indians from the Piute, Snake and several other tribes participated. The total number of Indians engaged is found to be 500 or 600, but in what proportion this aggregate was made up from the various tribes participating does not appear.

The depredation for which the present suit is brought was committed in the course of this raid in the early part of June, 1878.

ASSIGNMENTS OF ERROR.

It is submitted that the Court of Claims erred in these respects:

1st. It was error to hold that the facts found by the court amounted to a breach of amity.

2nd. It was error to find the fact of war from the evidence before the court.

3rd. It was error to hold that subject Indians, like the Bannocks, are capable of making war with the United States.

4th. It was error to hold that the phrase *in amity*, occurring in the act of March 3, 1891, is equivalent to the words *at peace*.

5th. It was error not to hold that this case is within the jurisdiction conferred upon the court by the second clause of the first section of the act of March 3, 1891, and that the hostility of the Indians is immaterial.

I.

The court below erred in holding that the facts found amounted to a breach of amity between the United States and the Indians.

The Indian depredation act of 1891 extends the jurisdiction of the Court of Claims to :

"All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

The court adopts the definition of the word *amity* given by the Century Dictionary, as follows :

"Friendship in a general sense, harmony, good understanding, especially between nations; political friendship, as a treaty of amity and commerce."

Under this definition it is held that peace, or absence of actual military operations, is essential to amity, and that, in the present instance, the fact that the Indians were in conflict with the military force of the United

States indicates conclusively that they were not in amity.

The authority of the Century Dictionary, or of any other similar work, cannot be conceded to be conclusive upon the meaning of the word *amity* as used in this statute. Such dictionaries, however ambitious their purpose, are necessarily too comprehensive for technical accuracy, and are professedly intended to meet the wants of the general reading public rather than for the guidance of courts on questions involving niceties of definition. That the sense of the word *amity*, as used in international law, has escaped the notice of the lexicographers will not surpise any one who has examined the definitions of other legal terms as given in the general dictionaries. For example, in Webster's Unabridged dictionary the definitions of *abatement* and *deraign* are strikingly inadequate for technical purposes, and the verb *to alien* does not occur at all. The definitions of these and of other technical terms in other dictionaries of reputation will be found similarly defective for juridical purposes.

The definition of the term *amity* which the Court of Claims quotes and adopts is only another illustration of the inadequacy of popular lexicons to judicial needs. Indeed, it would probably be impossible to frame a definition of the term which would be at all useful, the word in question being, like many other legal terms, more easily understood than defined.

"To frame a definition of any legal term which shall be both positively and negatively accurate, is possible only to those who having legislative authority can adapt the law to their own definition. Other persons have

to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not be taken. All that they can usefully attempt is to analyze the meanings of the words they use and to take care not to employ the same words in different senses, where so to do can possibly lead to confusion."

Lindley on Partnership, p. 1.

It is, therefore, not proposed to attempt an exact definition of the word *amity*, but to show that the term is used in legal writing in a sense which is far from identical with any of the synonyms given in the popular dictionaries, and that it denotes a political status the nature of which can be best understood by consideration of some of its characteristics.

It is obvious that the words said to be equivalents of amity cannot be used at all of international relations except in very limited and highly metaphorical senses. Nations cannot be said to have friendship or affection for each other, because a nation, like any other corporation, has no soul and is incapable of sentiments. What is called friendly intercourse between nations is limited to conventional courtesies between their respective officials which carry no significance of such friendship as exists between individuals. Goodwill never goes to the extent of self-sacrifice; and the good understanding which commonly obtains is a mutual understanding that each nation will pursue its own interests at the expense of the the others whenever practicable. The phrase, *political friendship*, which occurs in the definition quoted, comes nearer than any other to fixing the meaning of the term

amity as used in international law; and political friendship is obviously distinguished from that friendship which exists between individuals. The relations and policies of England and Russia have been for fifty years such as would be inconsistent with ordinary friendship, yet the two nations have certainly been in amity with each other since the treaty of 1856. France and Germany have not for twenty-five years shown much friendship for each, whether the acts of the two governments or the feelings of the two peoples be considered; but they are certainly in amity. So friendly relations and diplomatic intercourse between two nations may be suspended indefinitely, or even be replaced by policies which between man and man would be distinctly unfriendly, but the status of amity will continue. Our embargo of 1807 cut off even personal and commercial intercourse between our people and those of Great Britain, and was even accompanied by some hostile collisions between American and English vessels; but so far was this measure regarded from being a breach of amity that it was professedly adopted in the interest of peace. In 1878, when the Russian army was on the point of entering Constantinople in pursuance of the treaty of San Stefano, an English fleet was pushed into the straits before the city with the avowed purpose of opening fire on the Russians if they should advance. In personal intercourse, such armed menace would not indicate friendly relations, good will, harmony, or peace; but in contemplation of law England and Russia were unquestionably in amity during these proceedings.

Retaliatory tariffs, discriminating duties, and the

mobilization of troops, which are of frequent occurrence in the relations between nations, are plainly not acts of friendship, but are yet peaceful and amicable measures.

We may go further and say that even hostile military operations may be carried on between nations without destroying the status of amity or political friendship between them. Thus a nation may in certain cases participate as an ally in a war between two other powers without a breach of neutrality, and of course without a breach of amity with the nation against which its troops are fighting. This is so where troops and supplies are furnished in pursuance of a previous treaty of alliance and subsidy.

"Neutrality may also be modified by antecedent obligations, by which the neutral is bound to one of the parties to the war. Thus the neutral may be bound by treaty previous to the war to furnish one of the belligerent powers with a limited succor in money, troops, ships or munitions of war, or to open his ports to the armed vessels of his ally with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy."

Wheaton Int. Law, Sec. 424 (Boyd's ed.).
Vattel, Law of Nations, Bk. III, Chap. 6, Sec. 101–105.
Woolsey, Int. Law, Sec. 163.

"Where one state stipulates to furnish to another a limited succor of troops, ships of war, money or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not

necessarily render the party furnishing this limited succor the enemy of the opposite belligerent. It only becomes such so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, have long been the accustomed relations of the confederate Cantons of Switzertand with the other European powers."

Wheat. Int. Law, Sec. 279 (Boyd's ed.).

Citing:

Vattel, Law of Nations, Bk. III, Chap. 6, Sec. 79–82.

Of course in such a case there is a practical exemplification of the apparent paradox, that a nation may at the same time be at war and be at peace with another nation. The hostility, which is actual warfare so far as it goes, is only war *quoad hoc*, and is not in consistent with the status of amity.

There are other hostile acts, involving the destruction of life and property, which are characteristic of war, and are war in a loose popular sense, but which are regarded in law as falling short of war properly so called, and quite consistent with the relation of amity. Mr. Wheaton, enumerating "the various modes of terminating differences between nations by forcible means short of actual war," mentions embargoes and sequestrations, and adds the following:

"2. By taking forcible possession of the thing in controversy, by securing to yourself by force and refusing to the other nation the enjoyment of the right drawn in question.

"3. By exercising the right of vindictive retaliation (*retorsio facti*), or of amicable retaliation (*retorsion de*

droit), by which last the one nation applies in its transactions with the other the same rule of conduct by which that other is governed under similar circumstances.

"4. By making reprisals upon the persons and things belonging to the offending nation until a satisfactory reparation is made for the alleged injury.....

"Reprisals are either general or special. They are general when a State which has received, or supposes it has received, an injury from another, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending State."

Int. Law, Sec. 290, 291.

"Retorsion and reprisals bear about the same relation to arbitration and war as the personally abating a nuisance does to a suit for its removal. States, as well as individuals, have a right to protect themselves, when injustice is done them, by removing the cause of offense, and that in disputes between nations this right is more largely extended than in disputes between individuals, is to be explained by the fact that in disputes between nations there are not the modes of redress by litigation which exist in suits between individuals. Retorsion and reprisal are often used convertibly.....These acts approach in character to war, to which they generally lead; *yet technically they are not war*, and there are cases where the remedy has been applied without war resulting."

Whart. Com. Am. Law, Sec. 206.
Whart. Digest Int. Law, Sec. 318.

In a report of the Senate Committee on Foreign Relations (Sen. Doc. 43, 23rd Cong., 2nd Sess.), relative to a proposed policy of reprisals against France, Mr. Clay says:

"Reprisals do not of themselves produce a state of public war, but they are not unfrequently the immediate precursor of it.....It cannot be supposed that France would tacitly and quietly assent to the payment of a a debt to the United States by a forcible seizure of French property, which after full deliberation the chamber had expressly refused its consent to discharge. Retaliation would ensue, *and retaliation would lead to war.*"

It will be observed that the reason given for the committee's recommendation against authorizing reprisals was that such a course would lead to war, not that it would be war; that reprisals would cause war, though they would not constitute war.

On this subject Chancellor Kent says:

"Reprisals by commission or letters of marque and reprisal, granted to one or more injured subjects in the name and by the authority of the sovereign, is another mode of redress for some specific injury, which is considered to be compatible with a state of peace and permitted by the law of nations.....

"These letters of reprisal, as being applicable to a state of peace, have been frequently recognized and regulated by treaty."

1 Kent Comm., p. 61.

In the same connection it is remarked that in the Articles of Confederation letters of reprisal are contem-

plated as issuing in times of peace; and in note *h* to the same page it is said:

"War does not exist merely on the suspension of the usual relations of peace. Commerce may be suspended or interdicted between the subjects of different States without producing a state of war. Reprisals and embargoes are forcible measures of redress, but do not *per se* constitute war, nor does the furnishing of specific assistance to one of the parties at war according to a previous stipulation.".

That amity denotes something different from peace or the mere absence of military operations appears further from the fact that actual hostilities may be suspended for long periods or indfinitely without restoring the status of amity between the belligerents. An armistice may last for years, but the two powers remain at war notwithstanding.

After the surrender of Yorktown in Oct., 1781, hostilities between the Americans and English ceased entirely. The provisional treaty was not signed until November, 1782, the definitive treaty not until September, 1783, and the British troops did not evacuate New York until November, 1783. It can surely not be said that the two nations were in amity prior to the definitive treaty. Indeed the fact that the United States were in alliance with France, which power was still actively engaged in war with Great Britain, was sufficient to preclude the status of amity. This condition of enmity between two nations to all outward appearance at peace with each other is illustrated by the following extract from the report of

Mr. Oswald, the English Commissioner, who negotiated the treaty of 1783:

"I then told the Doctor (Franklin) there was a particular circumstance which, of myself, I wished to submit to his consideration, as a friend to returning peace. England had ceased all hostilities against America by land. At sea it was otherwise, and however disposed we might be to stop these proceedings there also, I could not see how it could be done until the people of America adopted the same plan. At the same time, I was sensible that by the strict letter of their treaty with France, the Americans could not well alter their conduct before we came to a final settement with that nation. That this was an unfortunate dilemma for both of us, that we should be taking each other's ships when perhaps we might in other respects be at perfect peace, and that notwithstanding thereof we must continue in this course waiting for a conclusion with France and other nations, perhaps at a distant period." (Letter to Thos. Townsend, Aug. 11 and 13, 1782, 9 Sparks' Franklin, 386; 3 Wharton Dig. Int. Law., p. 937).

The distinction between hostile military operations and the state of war is illustrated by numerous historical incidents. The battle of Copenhagen in 1800, in which a Danish fleet was demolished by an English force, occurred while the two nations were unquestionably at peace with each other and was never supposed to disturb the relation of amity. The convention afterwards made was phrased in such a way as to avoid the appearance of closing a war; it professes to provide for the adjustment of certain differences and it contains no stipulation for the removal of former treaties which

would have been abrogated had a war existed. (Hertslet's Commercial Treaties, Vol. I, p. 207.)

Our own history presents more than one instance of actual exercise of military force against the subjects and in the territories of other nations, and these incidents have neither been supposed to constitute war, nor have they led to war. Such were the invasions of Florida, then Spanish territory, by Gen. Jackson, in 1814 and again in 1818, in both of which demonstrations of military force were made, and forts were captured, and in the latter of which a town was burned and two of the inhabitants hanged (Hildreth, History of the United States, Vol. VI, pp. 539, 641–644). These acts were the subject of vigorous remonstance on the part of the Spanish government, but were not considered as amounting to war or as terminating the amicable relalations of the two powers.

A yet more striking and more famous instance of hostile military operations between two powers which did not constitute war or interrupt the status of amity is afforded by the limited reprisals prosecuted by the United States against France between the years 1798 and and 1800. In consequence of aggressions upon our commerce made by France, Congress authorized a policy of capturing French vessels, which was put in execution and continued for nearly two years, the French spoliations continuing at the same time. The result was that a number of collisions occurred on the high seas between armed vessels of the two nations, many captures were made, and considerable life and property destroyed. Of course these events presented many of the features

which accompany and characterize a state of war; and in several cases where it became material to determine whether war then existed, the claim has been made that these proceedings constituted war. But this claim has never been allowed by any court, and it has been held on the contrary, that the two nations remained in a state of amity.

The question came before the Supreme Court of the United States in Bas v. Tingy, 4 Dall., 37, a case involving the amount of salvage to be allowed for recapture from a French cruiser. One-half the value of ship and cargo was claimed under a statute authorizing the allowance of that proportion in cases of recapture from an enemy. The question was, therefore, whether France was an enemy during the period of maritime hostilities above mentioned. If the court had entertained the views now presented on behalf of the government, that the use of military force resulting in destruction of life and property are infallible indications of a state of war, and that such facts must be held conclusively to constitute amity, the decision of this case would have been very easy and free from any embarrassment. But, in the face of these facts, the court felt bound to look further into the relations between the two countries, and their conclusion was far from that which the court below holds should be drawn from similar facts in the case at bar. It was held that the recapture was a case of recapture from the enemy, it is true, and that the case was within the statute allowing one-half for salvage. To this extent the condition of war was found to exist and France was held, for the purposes of the case in hand,

to be an enemy of the United States. But the court felt bound to go further and declare its opinion that the hostilities amounted to only a partial war, a war limited to certain persons and places, "a qualified state of hostility," and a "war *quoad hoc*." While recognizing a state of carefully defined hostilities, the court adverted to the fact that no declaration of war had been made, and that the statute authorizing the employment of force under certain conditions had omitted, apparently *ex industria*, to describe or refer to France as an enemy. From this the inference was drawn that a perfect state of war had not been intended. Mr. Justice Washington remarked that the use of the word *enemy* in the statute "might have constituted a perfect state of war, which was not intended by the government." Mr. Justice Chase said:

"The acts of Congress have been analyzed to show that a war is not openly denounced against France, and that France is nowhere expressly called an enemy of America, but this only proves the circumspection and prudence of the legislature."

Throughout all the opinions of the several members of the court there is a manifest solicitude to distinguish the hostilities of that period from that condition of things which is properly called warfare. And the result of the case seem clearly to confirm our proposition that actual hostilities do not necessarily evince a state of war, and that a partial or limited use of military force does not constitute the status of enmity which is, in technical language, the precise contrary of amity.

The Court of Claims was called upon to define the re-

lations existing between the United States and France, at the period mentioned, in the case of Gray, Admr. v. The United States, 21 Ct. Cl., 340, and the decision appears to adopt the proposition just stated. On page 367 the decision says:

"It therefore becomes of great importance to determine whether there was a state of war between the two countries.

"It was urged that the political and judicial departments of each government recognized the other as an enemy; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each government from the other and held for exchange, punishment or retaliation according to the law and usages of war.

"While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be inconsistent with a state of reprisals, straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after the conclusion of which the parties must, as between themselves, begin international life anew."

The court then proceeds to cite a number of reports and opinions of the statesmen of a later period who were called upon in the course of official duty to consider whether or not the hostilities of 1798 amounted to war. These opinions sustain the view taken by the court, that the hostile acts fell short of warfare. Mr. Everett characterized them as "peaceful remedies and measures

of defense.....vigorous acts of defense and preparation, evincing that if necessary, the United States were determined *to proceed still further and go to war.*"

In a speech on the same subject in the Senate, Mr. Webster said:

"I think it clear that whatsoever misunderstanding existed between the United States and France (from 1798 to 1800), it did not amount at any time to open and public war. It is certain that the amicable relations of the two countries were very much disturbed; it is certain that the United States authorized armed resistance to French captures, and it is certain also, not only that there was no declaration of war on either side, but that the United States, under all their provocations, never authorized general reprisals on French commerce. At the very moment when the gentleman says war raged between the United States and France, French citizens came into our courts in their own names claimed restitutions for property seized by American cruisers, and obtained decrees of restitution. They claimed as citizens of France and obtained restitution in our courts as citizens of France."

Referring to the naval operations, Mr. Webster continued:

"But there may be acts of authorized force, there may be assaults, there may be battles, there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under the practice of retorsion, which is justified, when adopted for just cause, by the laws and usages of nations, and which all the writers distinguish from general war."

Mr. Webster also called attention to the fact that by the act of February 20, 1800, war was still spoken of as a future contingency. (4 Webster's Works, 163).

These authorities seem to establish the fact that amity denotes a certain legal and political status which is by no means identical with peace, if by *peace* is meant merely the absence of military operations. It is clear that amity is not inconsistent with many acts which amounts to warfare, as warfare is understood in popular speech. Amity may doubtless, as a usual thing, be inferred from a condition of peace; and war or enmity is *prima facie* indicated by belligerent acts. But the external and visible acts of the nation's military forces are not infallible criteria of the national status. The holding of the court below, that the defendant Indians were not in amity with the United States because they appear to have had some collisions with the Federal troops, rests upon an erroneous conception of the term amity. It overlooks the distinction between military operations and the status of war, a distinction clearly recognized by all courts and publicists.

Nor is this distinction a mere theoretical refinement, the suggestion of some scholastic philosopher disposed to metaphysical quibbles. On the contrary, it is adopted by men of affairs in the practical conduct of international relations, and especially by courts in determining the rights which depend upon conditions of war and peace. The reason is that the change from amity to enmity involves such radical changes of national and individual rights and relations as to necessitate precise definition. The institution of war abrogates existing

treaties between the two nations, concludes diplomatic, commercial and social intercourse, dissolves partnerships between citizens of the belligerent states, suspends the execution of contracts and payments of debts, cancels bills of exchange, makes trade illegal and liable to punishment, exposes property to capture and confiscation, and closes the courts of each belligerent to subjects of the other. Obviously the change of status which involves such tremendous and far-reaching consequences cannot be too accurately defined nor too carefully distinguished from other conditions which may, to casual observation appear the same thing. Accordingly we find that the Supreme Court in Bas v. Tingy, *supra*, went beyond the immediate needs of the case to negative the idea that their decision affirmed the change of status which produced the results above indicated. Mr. Webster, in the speech above quoted, notes the fact that our courts remained open to citizens of France during the hostilities. These facts will suffice to suggest some of the reasons why war, in the sense that is contradistinguished from amity, is not allowed to be confused with casual, local, or temporary hostilities, and to show that the distinction between enmity and such irregular and incomplete war rests upon solid foundation. It would be ruinous if all the commerce of two nations could be thrown into collapse by the mere fact of an accidental or inconsiderate skirmish between their troops.

To illustrate how practical is the distinction between hostile military operations and the state of war, let it be considered what would have been the result had a collision occurred between the English and Russian

forces at Constantinople on the occasion in 1878 above mentioned. Such an event would certainly not have stopped the course of correspondence and exchange between the two countries, as is the result of war. On the contrary, all persons in either country having commercial relations in the other would have used extraordinary activity to press pending transactions to a settlement, stimulated by the very fact that a war seemed imminent. Under such circumstances war does not exist with its suspension of international correspondence, but business is urged by the prospect of a war to come.

In view of these considerations it is submitted that the court below erred in assuming that mere military operations necessarily work a breach of amity between two powers. To effect such a change of status something more must occur, and the fact of the change must be shown by some other and different evidence.

II.

The Court of Claims erred in finding the fact of war from the evidence before the court.

The evidence presented to the court and made part of the record consists of reports and correspondence of various military officers concerned in the operations against the defendant Indians. There is nowhere any declaration, proclamation or other document purporting to declare a war or to announce the existence of a war with the Indians. It may be conceded that there is abundant evidence of military activity; but there is not a syllable tending or purporting to show a change in the political status of the United States.

It is submitted that, in the absence of some distinct

declaration by the political authorities showing the existence of war, it is incompetent for any court to find the fact of war.

The momentous consequences flowing from the institution of war, and the change from the status of amity to that of enmity, make it of supreme importance that the fact and the date of the change should be authoritatively determined and made known. It cannot be left to the private knowledge and judgment of each individual to ascertain whether or not his nation is at war. Neither is it supposed to be the province of the judiciary to determine the question. To collect evidence from divers sources bearing upon the fact of war, to hear testimony tending to show the existence of war or of peace, to ascertain the position and movements of troops, and to infer from proof of marches, retreats and battles that a war is or is not in progress, are certainly not the ordinary incidents of judicial duty. Courts have not the machinery for the collection of such evidence, nor is the question of a character suited to judicial decision. And it is believed that no court has ever, heretofore, undertaken to examine testimony bearing upon military operations and from such evidence to determine the fact of war or peace.

As the status of the nation is a political question, so the change from the status of amity to that of war is a fact to be determined and announced by the political department of the Government. It is not intended to claim that there must be a formal declaration of war after the ancient and mediæval manner; but there must be a distinct announcement by proper authority of the

existence of war. Upon this point Chancellor Kent says:

"But, though a solemn declaration or previous notice to the enemy be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. War, says Vattel, is at present published and declared by manifestoes. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them. As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, official notice to all the world, and equivalent to the most solemn declaration." (1 Com., 55).

On the same subject Mr. Wheaton writes:

"The present usage is to publish a manifesto, within the territory of the state declaring war, announcing the existence of hostilities, and the motives for commencing them. The publication may be necessary for the instruction and direction of the subjects of the belligerent state in respect to their intercourse with the enemy, and regarding certain effects, which the voluntary law of nations attributes to war in form. Without such a declaration it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war from those which either nation may consider naked wrongs, and for which they may, under certain circumstances, claim reparation." (Int. Law, Sec. 297)

If, as is contended above, war is a political status, existing in contemplation of law and as the result of action

by the supreme power of the state, the existence of that status must be known from the authoritative expressions of that branch of the government which is empowered to fix it. On this point all the authorities, ancient and modern, are in agreement. The question of national status is to be determined by matter of record and never by testimony.

"All leagues or safe conducts are, or ought to be, of record—that is, they ought to be enrolled in the chancery to the end the subject may know who be in amity with the King and who be not, who be enemies and can have no action here, and who be in league and may have actions personall here."

4 Inst., 152.

In the case of the Pelican, 1 Edwards Adm. Rep., App. D., Sir Wm. Grant said:

"It always belongs to the government of the country to determine in what relation any other country stands toward it; that is a point upon which courts of justice cannot decide."

This is quoted with approval in:

Blackburne v. Thompson, 15 East, 81.

"In speaking of public war.....I mean to exclude all hostility of any kind not having for its avowed object the exercise of some influence or control over the adverse nation as such.

"I deny that public war in this sense can be made out by affidavit or by any other medium of proof than the denunciation of war by one or both of the two nations who are parties to it."

Cowen, J., in :

People v. McLeod, 1 Hill, 377 ; 25 Wend., 483.
37 Am. Decisions, 328.

In the case of Williams v. The Suffolk Insurance Co., 13 Pet., 421, this court said :

"In the cases of Foster v. Nelson, 2 Peters, 253, 307, and Garcia v. Lee, 12 Peters, 511, this court has laid down the rule that the action of the political branches of the government in a matter that belongs to them is conclusive.

"If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States, whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise and so destructive of national character."

As to the conclusiveness of the action of the political branch on political questions, may be cited in addition :

Luther v. Borden, 7 How., 1.
Martin v. Mott, 12 Wheat., 19.
Rose v. Himely, 4 Cra., 241.
Gelston v. Hoyt, 3 Wheat., 246.

In the case of Bishop v. Jones, 28 Texas, 294, judgment had been given for the plaintiff on April 15, 1861, the day on which Fort Sumter was captured. On the next day the defendants moved to vacate the judgment on the ground that the hostilities in Charleston harbor consti-

tuted war, and the plaintiff, being a resident of the Northern States, was an alien enemy. The motion being overruled and appeal taken, the Supreme Court of the State held:

"The question upon which the case was decided in the court below seems to be equally well settled against the appellants. Could the court say, as a matter of judicial knowledge, on the day the motion for a new trial was overruled, that war existed between the Confederate States and the United States? We answer this question emphatically in the negative. Viewed in the light of subsequent events, we may and do in the popular sense speak of the war as having commenced at a period anterior to that on which this case was acted upon in the court below. But when we thus speak, we may and generally do attach a very different signification to the word from that which must be given it by law.

"War does not exist merely on the suspension of the usual relations of peace. Commerce may be interdicted without producing it. Reprisals and embargoes are forcible means of redress, but do not *per se* constitute war. Hostile attacks and armed invasions of the territory or jurisdiction of a nation, accompanied by the destruction of life and property by officers acting under the sanction or authority of their governments, however great and flagrant provocations to war, are often atoned for and adjusted without war ensuing.

"War, in its legal sense, has been aptly defined to be 'the state of nations among whom there is an interruption of all pacific relations and a general contestation of arms authorized by the sovereign.' It is true, it may and has frequently in latter times been commenced and carried on without either a notice or declaration. But still there can be no war by its government, of which the court

can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by that department of the government clothed with the war-making power. In the Confederate States, Congress was invested with this power. Until it acted, however great the provocation or imminent its probability, the courts could not say that amicable relations might not be restored without actual war. If Congress, when it acts, should declare the war to have existed anterior to its declaration, the courts will follow the declaration; and if the question should be subsequently brought before them, the courts will follow the declaration and take judicial notice of its existence from the time thus fixed. But for them to attempt to declare its existence as a matter of legal knowledge, before any action has been taken by the war making power, would be a most flagrant violation of duty."

"The question whether or not war, in its legal sense, exists, is to be determined alone by the political power of the government; and of this determination the courts must take judicial knowledge. It is not a question that can, in any event, be left to a jury."

Sutton v. Tiller, 6 Coldwell (Tenn.), 595.

This court has repeatedly laid down the same doctrine in cases involving the existence and the date of the late Civil War. In none of these cases has the court looked to the initiation or progress of military operations, but always to the acts of the executive announcing the condition of public affairs.

The Protector, 12 Wall., 700.
Adger v. Alston, 15 Wall., 555.
Batesville Inst. v. Kauffman, 18 Wall., 151.
Matthews v. McStea, 91 U. S., 7.

In U. S. v. Anderson, 9 Wall., 56, this court had before it the question when the Civil War ended. Lee had surrendered April 9, 1865, Johnston a fewdays later, and Taylor on May 4, and on May 26, Kirby Smith surrendered and dissolved the last organized military force of the late Confederacy. If, now, the status of warfare depended upon the continuance of actual hostilities, that is, if amity were to be tested by the absence of military operations, the court would have been obliged to adopt one of these dates for the conclusion of the war, and to have determined which one of these surrenders disposed of hostile forces sufficiently to restore the condition of peace or amity. Was peace restored when Lee surrendered, or Johnston, or Taylor, or Smith, or at some later date when the last band of stragglers or guerrillas was dispersed? The court declined to consider any of these dates, but accepted as conclusive the Presidential proclamation of August 20, 1866, announcing that on that date the rebellion was at an end. As this date was more than sixteen months after Lee's surrender and nearly fifteen months after the last armed force disappeared from the field, the case appears to warrant these propositions:

1. A state of war may exist without military activity and without possibility of military action; and *e converso* there may be a state of peace while military operations are in progress.

2. This court does not consider itself at liberty to infer the existence of war or of peace from proof of military action or non-action, but looks for information on these points to the official declarations of the executive.

The decision of the U. S. v. Anderson is followed in:

McKee v. Rains, 10 Wall., 22.
McElrath v. U. S., 102 U. S., 426.
Phillips v. Hatch, 1 Dillon, 571.
Chappelle v Olney, 1 Sawyer, 401.
Perkins v. Rogers, 35 Ind., 125.
Brooke v. Filer, 35 Ind., 402.

Prior to the decision of this court in U. S. v. Anderson, the same question had been presented to the Court of Claims and had been decided in the same way and on the same line of reasoning. In Grossmeyer v. U. S., 4 Ct. Cl., 1, 15, *et seq.*, Casey, Ch. J., speaking for the court says:

"These and many other considerations convince me that Congress never intended to impose the duty of deciding the question upon us or upon any other court. 'The supression of the rebellion,' describes a political condition and not a judicial fact. That condition can only be defined and determined by the political departments of the government; and their decision is not only binding but conclusive upon the judiciary. It resolves itself into a question of peace or war; and the right to make one and declare the other are among the express and enumerated constitutional prerogatives of Congress.....

"The only question that remains is, whether this action of the political departments binds the courts, or whether each court before which it arises may, in either case, decide it for itself. The answer to this question depends on whether the matter to be ascertained is a political condition or an ordinary fact. If the former, it is entirely outside the province of the judiciary; if the latter, it belongs to this court. And this must be deter-

mined from the nature of the point to be decided. In this case it is, whether a civil war did or did not exist at a certain time. That this is a matter for the political departments alone, and that the judiciary must follow and obey their decisions, is abundantly fortified by leading authorities in this and other countries. . . . . "

This rule for determining the existence of war is not only convenient and expedient, but is obviously the only one at all practicable. This court has, in Williams v. The Insurance Co., *supra*, adverted to the disastrous consequences which would follow if there should be a difference of opinion between the executive and the judiciary as to the fact of war and the relation of the nation to foreign States Again, if the existence of war is an ordinary question of fact, it must be left to the jury in each case as it arises, and it will be differently determined in different cases, according to the variant quantity and character of evidence presented to each jury. Still further, upon what principles is the status of war ascertained, by what criteria to be tested? What must be the extent of military operations, how much of pride, pomp and pageanty must be displayed, to constitute a war in the absence of a declaration by the political authorities? Is it war when ten Indians burn a house, kill a family and drive off cattle? Or must there be a fight? If so, does the settler's firing a shot in defense of his house make it war? If not, how many shots must be fired and by how many settlers? Or is it essential that militia be called out to repress the Indians? Or must Federal troops be used? If so, how many, one hundred or a thousand? And must battles be fought? If so, how many? And what

is a battle and how distinguished from a skirmish? Or how is a skirmish distinguished from an affray or from a mere commonplace assassination? How many troops must be killed and how many Indians? What proportion of the tribe must be out, ten men, or ten per cent of the warriors, or twenty per cent, or a majority, or the whole body of the tribe? And how long must the hostilities endure to be a war: a month, or a week, or is a single battle, a skirmish or an exchange of shots between pickets or stragglers sufficient?

It is manifestly impossible to formulate any principles which courts can lay down or juries apply in ascertaining the existence of war. The present case will illustrate this difficulty. The court below finds that the Indians were at war at the date of the depredation sued on, in June, 1878. But the court does not undertake to find when the war began or when it closed. The military reports show that the Bannocks had been restless and disposed to disorder and violence for nearly a year prior to the date of this depredation; that the indications of hostile feeling became more pronounced and the acts of violence more frequent through that period, until gradually and by successive acts of individuals a large body of Indians were engaged in open robbery, arson and murder. Where shall the line be drawn to distinguish acts of war from acts of private revenge and individual crime; and what date shall be fixed to separate lawless acts of single Indians from hostile acts of the tribe? If on the day the appellants lost their property, what shall be said of a depredation committed the day before, or a month before, or at any earlier period of the raid? The

same difficulty will be found in fixing a date for the end of the war. It appears from the record that throughout the summer of 1878 there was more or less fighting; there were battles, skirmishes and fights between individuals and small parties; the Indians were gradually captured and restored to their original reservation; and these matters were in progress until some time in the autumn. Manifestly it is impossible from the record to fix a date on which the war ended and amity returned. Supposing it possible to say that a depredation in June was committed by Indians not in amity, what shall be said of a claim for damages sustained in July, or in August, September or October? At what point did the Indian outrages cease to be legitimate acts of war and become mere individual crimes, and where is the line to be drawn at which the troops ceased to contend against the public enemy and began the performance of mere police duty?

The court below fails to lay down any principles upon which these questions can be answered, and it is no disrespect to that learned and able tribunal to say that its later decisions in this class of cases manifest no little embarrassment in defining the limits of war and peace and in fixing the status of various tribes at various times when depredations were committed. In the nature of the case, it is impossible for a court to draw the line between depredation and warfare, between private crime and public hostility, because that is the peculiar function of the political branch of the government.

In the year 1868 a treaty was contracted between the

United States and the Bannock Indians, by the first article of which it was stipulated:

"From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it."

Revision Indian Treaties, p. 931.

"A state of peace and the continuance of treaties must be presumed by all courts of justice till the contrary be shown, and this is *presumptio juris et de jure* until the national power of the country in which such courts sit officially declare the contrary."

People v. McLeod, 1 Hill., 377; 25 Wend., 483.

It must certainly be assumed that the United States and the Bannock Indians were at peace and in amity in 1868. This was solemnly declared by those officials on either side who were empowered to fix the status of their people and authorized to make it known. This declaration was and is a matter of record. And at the date of the so-called Bannock war there had been no declaration made by similar authority purporting to alter the status fixed by the treaty of 1868 or to announce any alteration in that status. It is denied that the dispatches of subordinate military officers, or even the highest military officers, can have such effect. Those officers had no power to declare war, and they did not profess or attempt to do any such thing. The dispatches and reports from which the court below infers the existence of a war relate entirely to operations in the field and not at all to

the political relations of the United States with the Indians.

These dispatches, moreover, are insufficient as evidence of war because they were not intended for the guidance of the public and were in fact not made public at the time. On the contrary, some or most of them were doubtless regarded as confidential and secret, as most military correspondence is. The authorities above cited show that war must be announced by proclamation, manifesto, or some similar document, emanating from some authorized source, and made public to warn citizens of the change in their public relations and admonish them of their new duties and dangers. Nothing of this sort appears in the papers collected by the court below. It cannot be supposed that the public was charged with a knowledge of the secret correspondence of the War Department, and that a change of status could occur without some official announcement.

Still further, a war, if it be war in the legal sense as contradistinguished from certain hostile operations loosely called by the same name, abrogates existing treaties between the belligerent powers. (1 Kent. Com., 170; Wheat. Int. Law, Sec. 275; Whart. Dig. Int. Law, Sec. 135). It extinguishes all debts between the parties to the war and puts an end to all claims for indemnity for tortious acts committed under the authority of one government against the citizens of the other, unless they are provided for by the treaty of peace. On this ground President Polk, in his annual message of 1847, urged the impolicy of concluding the existing war with Mexico

without express stipulations securing to our government indemnity for the cost of the war and for injuries done to individual citizens.

The hostilities between the United States and the Bannock Indians had no such effect upon existing treaty stipulations. By the treaty of July 3, 1868 (15 Stat. at Large, 673), concluded between these parties ten years prior to the outbreak under consideration, it was agreed that "peace between the parties to this treaty shall continue forever," and certain definite arrangements were instituted to regulate permanent relations. These stipulations relate to boundaries, punishment and pecuniary compensation for injuries done on either side against the other, measures for the promotion of civilization and the encouragement of agriculture among the Indians, and the advancement of their material well-being by subsidies of clothing and money to be furnished by the United States. So far as can be learned from official records and the statutes published by authority, these stipulations have obtained in full force from the day of their date to the present day. The only modification of them that has ever been made is contained in the treaty dated May 14, 1880 (Indian Laws, p. 339), by which the Bannocks and certain allied tribes ceded to the United States some of their lands previously reserved, and secured in payment therefor an augmentation of their annuities.

It is clear, therefore, that the Bannock disturbances were not regarded by the political authorities as war in such sense as to abrogate the treaty of 1868. Since 1878 no negotiations have been had looking to a renewal of

the previous treaty or to replacing it with a new arrangement; no convention has purported to re-establish the previous *status*; no executive or legislative act has ever announced the conclusion of hostilities or the redintegration of friendly relations. The statutes show that the appropriations in fulfilment of treaty obligations continued from year to year without interruption, diminution or suspension on account of the hostilities. On May 14, 1880, eighteen months after the last act of violence on either side, and about twenty-one months after the last collision between organized forces, we find the tribe apparently living upon its original reservation and ceding part of it to the United States. The Government does not exact this cession as a penalty or by way of indemnity for prior hostile acts, but pays for it by augmented supplies. No cessation or diminution of the supplies stipulated for by the antecedent treaty is suggested. The conclusion is irresistible that the civil authorities, upon receiving the captured Bannocks from military custody, had re-instated them upon their original reservation, and continued to issue to them the usual means of subsistence, precisely as if the established order of things had never been interrupted. Such, at least, is certainly the usual sequel of Indian outbreaks; the Government, from motives of policy and humanity, refrains from inflicting any general or severe punishment upon the refractory Indians, and proceeds to provide for their comfort according to the arrangements previously adopted. There is nothing in the record to suggest a doubt that this was the policy adopted in the case of the Bannocks, and all the facts support the presumption that

the old relations were resumed and continued with mutual oblivion of the hostile acts.

Neither is there any evidence that the Indians regarded themselves as at war with the United States.

There were, it is true, battles, skirmishes, and individual homicides, and the record indicates divers acts of murder, robbery, rape and arson. But it does not appear that the Bannock nation as such, acting in its national, tribal or corporate character, if such character it have, ever directed or authorized these acts. It is not suggested that the tribe ever in council determined upon war, or that it ever announced hostile purposes through its chiefs, headmen or whatever governing body was authorized to declare the tribal status and policy. Whatever hostile acts were committed seem to have been the acts of individuals, acting on their own responsibility. That such private hostilities do not make a tribal war was held by the Court of Claims in the case of Preston Beck, decided in 1862:

"The treaty declares that perpetuate peace and friendship shall exist between the contracting parties, and we think that this placed the Navajoes in amity with the United States, and that this relation could not be altered by depredations of individuals of either of them."

Beck v. U. S., Rep. Ct. Cl., 1862-3, No. 282.

"Bryan held opinion in 19 E., 4, that if all the subjects of England would make war with a king in league with the King of England, without the assent of the King of England, that such a war was no breach of the league."

4 Inst., 152.

1 Bl. Com., 252.

Hostilities waged without such authorization constitute an informal, illegitimate war, which is more properly called a depredation.

Vattel, Bk., III, c. 4, Sec. 68.

"Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers."

1 Bl. Comm., 257.

That temporary Indian forays do not constitute war in such sense as to suspend the running of the statute of limitations is held in :

League v. Rogan, 59 Texas, 427.

It is, therefore, submitted that there is no evidence from which the fact of war and the interruption of amity can be inferred.

III.

The Court of Claims erred in holding that the Bannock Indians, being subjects of the United States, could wage war and be otherwise than in amity with the United States.

Viewed as transactions between independent states, members of the family of nations, the Bannock hostilities would unquestionably be governed by principles of international law hereinbefore laid down. It remains to inquire whether those principles apply to such an affair between the United States and a tribe of Indians resident within their territory.

From the opinion of the court below it appears that that court considered that the doctrines of international law are not to be applied to such a case. The opinion cites a former decision of the same court in Alire v. U. S., 1 Ct. Cl., 238, in which it was said :

"In our intercourse and dealings with these savage tribes, regarded in our law as independent and domestic nations, we do not apply the same rules of peace and war that regulate the intercourse and fix the relations between us and foreign independent nations." (Rec., p. 29).

That the case of Alire affords no authority to guide us in the present case will appear from an examination of the facts and the decision therein. In that case the claimant sought to establish his right to a land warrant under a statute which granted such a warrant to every surviving soldier of the national wars. The claimant showed that he participated as a volunteer in a series of military operations against the Apache Indians which were very similar in character to those conducted against the Bannocks in 1878. It may be a material fact of distinction that in the Apache war the military commander requested the assistance of volunteer militia, which was not done by the United States authorities in the Bannock war. The court held that the operations against the Apaches constituted a war in the sense of the statute granting land warrants.

Against the correctness of this decision there is no suggestion to be made. But it is not perceived how the decision of a case in no wise involving the political status

of any state or tribe can be a guide in a case like the present which turns entirely upon the question of status. In Alire's case the court merely found the fact of war in the sense of the statute, and had no occasion to look further in order to ascertain the bearing of this fact upon the legal relations between the United States and the Indians. All that was necessary was to compare the facts found with the statute and to decide whether this was the kind of war contemplated by the statute. The decision does not go, nor purport to go, further than this. War, as we have seen, is a term which is used in a variety of senses. It may cover all kinds of military operations from a series of desultory skirmishes to a series of campaigns extending through several years. It is applied in loose popular speech to the predatory excursions of savage tribes and gangs of buccaneers, to the irregular operations of guerillas, to the enterprise of insurgents, and to the riotous proceedings of mobs if of more than brief duration. Yet even in ordinary speech a difference is apprehended between such varieties of war and that institution recognized as more properly war, the exercise of military force between states of respectable character and considerable strength, conducted systematically by organized armies, according to certain commonly recognized usages, and intended for the protection or enforcement of national rights and not for personal revenge or plunder. So the most careless speech recognizes a difference between war against pirates or mobs and war between two members of the family of nations. The expeditions undertaken by the United States to punish the pirates of Barataria and Amelia Island are clearly

different in nature and in jural consequences from the wars with Great Britain and Mexico. In the case of Alire it was contended on behalf of the government the term *war* should be restricted to such wars as those last named, the wars which carry with them the chacteristics and legal consequences attached to war by the principles of international law, the wars which conclude amity and induce the opposite status of enmity. The court interpreted the term, as used in the statute, in a wider sense, but stopped far short of declaring that this war, which is carefully distinguished as an "Indian war," and recognized as a peculiar variety of war, was identical with that kind of war which is so designated in technical language. In Bas v. Tingy, as we have seen, the Supreme Court, in a similar manner, interpreted the word *enemy* in a particular statute applying to France, but took pains to distinguish the term as so used from its ordinary and general signification. In both cases remedial statutes, intended for the benefit of meritorious classes of citizens, were liberally construed for the purpose of advancing the respective remedies. It would be an inversion of the same principle of construction to apply these exceptional interpretations to the present case for the sake of defeating the remedy intended for an equally meritorious class.

It appears also from the opinion in the Alire case, which is quoted in the court below, that there had been a recognition of the existence of the Apache hostilities by certain public acts of the President and of Congress, and that the hostilities were concluded by a formal treaty of peace, facts which are not shown in the present

record, and facts the absence of which makes it impossible to find the existence of a war.

It should be noted also that the judgment of the Court of Claims in the case of Alire was held by this court to be without jurisdiction, and is therefore of no value as a precedent: U. S. v. Alire, 6 Wall., 573.

So far as the court below holds that the general principles of international law are subject to some modification when applied to the peculiar relations between the United States and their subject Indian tribes, the appellants fully agree with that court. But it seems to counsel that those peculiar relations have an influence precisely the opposite of that which the court holds them to have. Instead of making it easier to prove and find the existence of war, the relations of the Indians to the government make war in its correct legal sense unlikely, if not impossible, and necessitate stricter proof and more definite public acts to show a change of status than would suffice were the parties states in the proper sense of international law.

It may fairly be doubted if Indians, no further advanced in civilization and social organization than are Bannocks, are capable of waging war and assuming the character of public enemies. It has been already remarked that the least discriminating sense apprehends a difference between military operations against pirates, savages, and similar loosely organized bands of marauders, and the war against states which has certain incidents and consequences defined by the courts. This difference has been recognized from the earliest existence of organized states. The Romans on several occasions

closed the gates of the temple Janus to denote a condition of universal peace, though in fact there never was a time when some kind of military operations were not in progress within the territories or on the frontiers of their dominion. So the Barbary States were for a long excluded from the family of nations and denied the rights of war. (Wheat. Int. Law, Sec. 37.) Within a comparatively short time a ship, which had been captured and sold by one of these states, was claimed in the English courts by the original owner upon the ground that the capture was piratical and not belligerent, and the sale therefore conveyed no title. The court held the sale valid to pass title on the express ground that the Barbary States have in modern times assumed that settled and coherent character which is requisite to constitute a state. (The Helena, 4 C. Rob., 5.) In the present case it would difficult to dignify the operations of the Indians or those against them with the name of war. Here is a horde of savage individuals held together only by bonds of relationship or association, having no organic character as a nation, state or tribe, with only such rude semblance to government as suffices to secure unity of action when on the war path, possessing no corporate reputation to protect or public interests to advance, who become restless on account of some real or fancied distress, and proceed to ravage a wide tract of country, murdering and plundering the unoffending inhabitants. This is not a war in any proper sense of the term, but merely brigandage. The motive is not love of country or solicitude for any public interest, but only thirst for plunder and lust of blood. Instead of that

patriotic love for an ideal entity called the nation, which alone justifies and sanctifies the soldier's deeds of blood, there is only the *animus furandi* which inspires the bandit and the buccaneer. Military operations against such marauders are rather the punishment of criminals than the vindication of national rights against the public enemy.

Such operations may well be called warfare within the sense of statutes granting pensions or other rewards for service in war, because the citizen who fights in such a cause incurs greater hazard and hardship and earns less glory than he who enters a more dignified military service. But it would approach the nature of a paradox to hold that the operations, undertaken by the Government to keep a band of brigands in order, constitute that state of warfare which justifies the commission of the very crimes which the Government is trying to prevent, and exonerates the criminals from responsibility for their mischief. Yet, unless the purpose of the argument of the Government is misunderstood, its effect is that these Indians are not liable for their outrages, because in repressing them the Government was obliged to make use of its troops, and thereby converted murder and robbery into acts of legitimate warfare.

Such, at any rate, is not the way in which such exercise of the national power is usually regarded in courts of justice. The distinction between warfare on the one hand, and, on the other, the use of armed force to enforce the laws, repress disorder and protect the public against domestic violence, is universally recognized.

"To prevent all misunderstanding in the progress of the argument, it is proper to observe farther that an act of jurisdiction exerted by inferior magistrates, civil or military, for the arrest or punishment of individuals, is not public war of either kind. So long as the act is kept within legal compass, though its exertion be violent, where for instance the object is to suppress a riot, quell an insurrection, or repel the hostile incursions of individuals, it is, though sustained by a soldiery in arms, only one mode of enforcing the criminal law. It is like calling out the militia as a *posse comitatus* to aid in the execution of process."

People v. McLeod, *supra*.

A still more cogent reason for distinguishing these disturbances from a state of war is the fact that the Bannocks are incapable of waging war in the legal sense of the term. The status of Indian tribes within the territorial limits of the United States has been the subject of repeated adjudication, and the cases defining their relations to the National Government are too familiar to need extensive review in this connection. With sufficient precision for present purposes it may be said that such tribes are recognized as domestic, dependent nations, allowed a certain latitude in the administration of their internal affairs and peculiar interests, but subject in all things, even in their personal conduct and individual rights, to the supervision of Federal executive officers and the control of the National Legislature. In the case of the Cherokee Nation v. Georgia, 5 Peters, 1, a tribe, much more advanced in civilization, organization and settled order than are the Bannocks to-day, was said to

be a nation, but the court laid special stress upon the fact that it was to be distinguished from the political bodies strictly described by that term. The weight of the decision was thrown upon their domestic and dependent character, those qualifications which distinguish an Indian nation from the nations mentioned in the Constitution and laws. The decision was to the effect that an Indian nation, so called, was, by reason of these very characteristics, not a nation capable of suing in the Federal courts as nations properly so described are entitled to do. In Mackey v. Coxe, 18 How., 100, the relation which these tribes sustain to the United States was assimilated to that of the territories before admission to the Union, having a more or less coherent corporate character and a certain share of local self-government, but still subject to the overruling direction of Congress. The tribe in question was the Cherokees, who had reached a degree of civilization and a consistency of organization which is indicated by the existence of courts and written laws. The Supreme Court in this case affirmed the validity of their statute on the subject of administrations, and allowed full faith and credit to the decree of one of their probate courts. The tribal government was described as "not a foreign, but a domestic territory—a territory which originated under our Constitution and laws." At the same time the sovereignty of the United States was distinctly affirmed. In other cases the fact of Indian subjection and the relation of allegiance has been more strongly insisted upon. These tribes have not even a property in the soil which they occupy, but only a usufructuary interest, the ultimate title

and right of disposal being in the United States. (Beecher v. Wetherby, 95 U. S., 517; U. S. v. Cook, 19 Wall., 591.) They cannot sell even their possessory right. (Fletcher v. Peck, 6 Cr., 87; Fellows v. Blacksmith, 19 How., 366). They are subject to the regulations of Congress in matters of trade (Worcester v. Georgia, 6 Pet., 515), to the Federal revenue laws (The Cherokee Tobacco, 11 Wall., 616) and to any judicial jurisdiction or general statutes which the Government may see fit to extend over them or their territory (Sundry Goods v. U. S., 2 Pet., 358; U. S. v. 43 Gallons Whiskey, 108 U. S., 491; U. S. v. Rogers, 4 How., 467). So much further does the national control extend over Indians than over citizens that the attitude of the nation is said by courts to be that of a guardian towards a ward, the significance of which is illustrated by the exercise of authority to regulate such details of personal conduct as the use of spirituous liquors (U. S. v. Holliday, 3 Wall., 407; U. S. v. Kagama, 118 U. S., 375; Choctaw Nation v. U. S., 119 U. S., 1).

These citations will show how widely Indian tribes differ from states or nations, and how complete is their relation of subjects. As tribes they have less measure of autonomy than the territories, as individuals less personal liberty than citizens. To speak of their spasmodic resistance to the law as war is possible only by such extreme extension of the meaning of that term as approaches a figure of speech. In the same way all sporadic outbreaks of riotous violence, all rescues of prisoners, and all individual acts of resistance to arrest might be denominated war. With equal propriety the collisions be-

tween whites and blacks which occasionally occur in southern villages are denounced in the head lines of newspapers as "race wars." So the strikes and labor disturbances which sometimes displace the ministers of the law, paralyze commerce and transportation in large regions, and necessitate the use of military force for their suppression, might be called wars. In short, the term *war*, in some of its many latitudinary senses, might be applied to every domestic disturbance in our history from the Whiskey Insurrection to the last instance in which the sheriff has summoned a *posse comitatus* to accomplish an arrest.

But in the present case, the controlling word of the statute is *amity*, the question is as to the status of an Indian tribe, a fixed legal concept. The word *war*, as used in this connection, must likewise be taken in its legal sense to denote a status opposite to that of amity. And it is submitted that no acts of violence on the part of citizens or subjects can amount to war in this sense, and that no degree of armed hostility, short of successful revolution at least, can change the status of insurgent subjects. In legal contemplation rebels are subjects or citizens, indissolubly bound to allegiance by the laws, held firmly in this status by moral and legal obligations above their own will, and which they cannot shake off by any acts of their own, and therefore made friends to their sovereign by overruling principles beyond their power to alter. Insurgents may obstruct the execution of the laws to a certain degree, may achieve a certain measure of independence in fact, and may thus impair the actual supremacy of their sovereign. But in

any court of justice wherein their status is considered, the supremacy of the sovereign is held to be unaffected by insurgent successes, and the rebels are, in legal contemplation, only recalcitrant subjects, not enemies. Of course if insurgents succeed in establishing actual and general independence as an accomplished fact, the courts will at that point take a different view. But we are not speaking of revolution, of which the essence is illegality and the justification is success, but of insurrection in progress, and at a stage when it is a subject of judicial cognizance as a matter known to the laws. And such a condition can never amount to war so long as the bands of government are unbroken, nor can the insurgents by their own acts convert their status of subjects in amity to that of aliens in enmity. Forcible resistance to the sovereign may expose the participants to the penalties of municipal law, as refractory children may become amenable to domestic discipline, but it does not translate them to the status of public enemies.

Armed insurrection does not alter the relation of the rebels to the sovereign any more than a conjugal quarrel or separation destroys the status of marriage or a soldier's desertion alters his military status.

That war and enmity, with their attendant legal consequences, cannot be predicated of those bound to allegiance by paramount obligations independent of their own volition, is most strikingly illustrated by the judicial treatment of questions arising from the great civil conflict which disturbed our country between 1861 and 1865. Eleven states, having unquestionably a large measure of sovereignty, completely organized and fully

equipped for all the functions of independent states, with resources of population and wealth amply adequate to rank as members of the family of nations, possessing in short every attribute characteristic of the political units defined by international law as nations, and only falling short of that status by reason of certain constistutional obligations, declared themselves released from these very obligations, and assumed the rank of independent nations. Their pretensions were sustained by joint effort and confederacy, the result of which was a series of gigantic military operations, involving armies numbering several million and protracted through four years. If war in fact were identical with war in law, this was war. It was unquestionably civil war in the fullest sense of that qualified term.

The executive and the judiciary conceded to the confederacy the status of belligerency, with all the rights and consequences growing out of status. The courts were obliged to recognize the existence of war for all purposes connected with the prosecution of military operations. Blockades were established, the laws of war enforced, civil law was suspended in the invaded districts, cartels for exchange of prisoners were agreed upon, prizes were captured and condemned in the courts of admiralty, and every other external and visible incident of war was present and recognized by the courts. Partnerships between citizens North and South were dissolved, and the statutes of limitations were suspended. If any domestic conflict could constitute war, dissolve the allegiance of subjects, and convert them into public enemies, this was such a war.

But, while enforcing the laws of war and the legal principles applicable to a state of war, the Federal judiciary never conceded a change of status on the part of the insurgents, nor held them as other than states and citizens in rebellion. Certain laws were relaxed to conform to the status of belligerency as distinguished from ordinary resistance to law, a relaxation made out of motives of humanity and expediency and which international law prescribes in all cases where insurrection attains a respectable magnitude and is carried on for any purposes not involving mere turpitude. But with all this, the doctrine was steadfastly maintained that the constitutional relations and status of the seceding states remained unchanged, and that no state or individual could alter that status by mere violence.

In Texas v. White, 7 Wall., 700, this doctrine was clearly and emphatically laid down by this court. The court reviewed the steps in the progress of Texas to secession and the condition of affairs which had obtained during the season of hostilities. It said:

"In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established by them.

"The position thus assumed could only be maintained by arms, and Texas accordingly took part with the other Confederate States in the war of the rebellion which these events made inevitable. During the whole of that war there was no governor, or judge, or any other state officer in Texas who recognized the national authority. Nor was any officer of the United States permitted to

exercise any authority whatever under the national government within the limits of the state except under the immediate protection of the national military forces."

To show that these events did not work a dissolution of the Union, the court set out certain historical and constitutional considerations to the result that, "the Constitution, in all of its provisions, looks to an indestructible Union composed of indestructible states," and continued:

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other states was as complete, as perpetual, as indissoluble as the union between the original states There was no place for reconsideration or revocation, except through revolution or through consent of the states.

"Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and the acts of her legislature, intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the state, as a member of the Union, and of every citizen of the state, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union. If this were otherwise, the state must have become foreign and her citizens foreigners. The war must have ceased to be a war for the suppression

of rebellion, and must have become a war for conquest and subjugation.

"Our conclusion, therefore, is that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred."

This case affords an extreme instance in which the antecedent status was unaffected by war-like operations. If a State like Texas, possessing all the substantial elements of sovereignty and every requisite to independent national life, could not by war in fact dissolve her relations with the Government and accomplish a status of enmity, how much less can enmity be predicated of an incoherent, unorganized horde of savages, subject in the minutest details of personal conduct to the direct control of the United States. To speak of subjects as enemies is a palpable contradiction in terms. Subjects are held in their relations to the sovereign by obligations which operate by their intrinsic immutable virtue, and without the assent of those bound.

The status of amity, impressed upon them by law, must be held indelible in any discussion which professes to define the effect of law. To hold that persons subject to law may alter their status by lawless acts, would be absurd in principle and dangerous in consequence.

Rebels are not enemies: U. S. v. Greathouse, 2 Abbott, 364.

The Confederate army was not a public enemy:

Ins. Co. v. Chester, 43 Pa. St., 491.

That Indians are not public enemies and a conflict

with an Indian tribe is not war, is the principle upon which the Senate has declined to confirm nominations to brevet rank under section 1209 Rev. Stat., which provides that the President, "by and with the advice and consent of the Senate, may in time of war confer commissions by brevet.....for distinguished conduct and public services in presence of the enemy."

Sen. Rep. 1950, 49 Cong., 2nd Sess.
Sen. Rep. 123, 51 Cong., 1st Sess.

And Congress has clearly and emphatically declared the status of Indian tribes by the act of March 3, 1871, now section 2079 Rev. Stat., providing that

"No Indian nation or tribe within the territory of the United States shall be recognized or acknowledged as an independent nation, tribe or power with whom the United States may contract by treaty."

If it should be deemed necessary to identify those Indians whom Congress intended to distinguish from those in amity with the United States, and who may possibly sustain other relations, a rational conjecture would fix upon those tribes who dwell beyond our territorial limits. Mexican and Canadian Indians are not in amity with the United States by virtue either of treaty obligations or of natural duty. Their is nothing which prevents their becoming enemies of the United States, if they have the degree of political organization and social consistency requisite to dignify them as corporate antagonists.

If any such foreign tribe should prove to possess the

essential characteristics of a state, it might be held capable of making war. So, also, if members of such a foreign tribe should join an invading army, as occurred during the war of 1812, they would become enemies.

That the phrase *in amity* was used in the statute to distinguish such foreign Indians from our own Indians seems the more probable because, without some such limiting phrase, the act would make the United States liable for the depredations of all extra-territorial Indians. The name, Indian, is applied to all the tribes indigenous to North and South America; it comprehends all the aboriginal inhabitants of the continent from the Esquimaux to the Patagonians. If the phrase *in amity* were omitted, the statute would appear to assume responsibility for the acts of all these tribes. The use of the phrase limits the meaning of the word *Indians*, to signify only those within our borders and subject to our empire, of whom alone the relation of amity can be affirmed. That Congress meant to distinguish foreign Indians from our own territorial Indians, and to assume obligations to indemnify for losses from the latter and not from the former, may be inferred from the principle enforced in our foreign diplomacy, that each nation is responsible for depredations committed by Indians subject to its control. This doctrine has been frequently affirmed in correspondence with the British and Mexican Governments, remonstrating with them for lack of vigilance in restraining their Indians, and recognizing a similar duty upon our own part. It seems that we have even been obliged to pay the Republic of Mexico "a heavy pecuniary consideration" to be released from our "obligations

in respect to predatory incursions of Indians from this country into Mexico," and we certainly hold that country to a similar responsibility. (Whart. Dig. Int. Law, Sec. 18).

This diplomatic correspondence shows the theory of the statute under consideration, and goes far to define its scope. The Government has laid down for foreign nations the rule that they must keep their Indians in order, and acknowledges to them a like obligation. The same obligation exists toward its own citizens. The Indians being wards of the nation, the nation is liable for their torts, especially those which it was bound to prevent. To no class is it more strongly obliged than to its own citizens. These the Government was bound to protect; these it has restrained from private revenge by penal statutes; to these it has, by a series of consistent statutes, beginning as early as 1794, held out promise of indemnity from the public funds. These statutes prescribe the conditions of indemnity in substantially identical terms, and in terms substantially identical with those used in the Act of March 3, 1891, referring these rights to the Court of Claims for adjudication. Underlying them all is the same recognition of liability for depredations which is declared in the foreign correspondence.

IV.

The Court of Claims erred in holding the phrase *in amity* to mean merely *at peace*.

The statute bears much internal evidence showing that the phrase *in amity* was not intended as the precise

equivalent of *at peace*, and that the purpose of the legislature was to make the application of the act depend upon the political status of the Indian tribe rather than upon the temper and conduct of its individual members.

The phrase *in amity* as it occurs in the law is used to qualify the words "band, tribe or nation," and is not connected with or referable to any word signifying individuals. The language is not "Indians in amity," but, "Indians belonging to any tribe, band or nation in amity." The phrase in question is separated from the word *Indians*, apparently *ex industria* and with a view to make the tribal status instead of the individual temper the criterion of indemnity. The amity of a tribe or nation is widely different from the amity of a person or persons. The fundamental error of the court below consists in taking a definition of this word which is applicable to individuals and applying the same definition to the status of a political body. The statute uses the word with reference to the tribe or nation, and must be understood in the sense of public law, that is the sense which is above contended for. Used in this sense, the word *amity* means something quite different from the word *peace*, if by peace is meant the mere absence of hostile operations

Again, it is scarcely possible that Congress intended to make the Indians liable for acts of individual lawlessness and release them from all responsibilities for tribal depredations. The tribe is made responsible for the acts of its members in the degree assumed by the Government. Why the tribe should be liable for the acts of individuals, but not for its own collective acts, cannot be

explained. On the contrary, it would be highly unreasonable to make the innocent members of the tribe suffer for the secret and furtive depredations of their evil-minded associates, but hold the tribe absolved from liability in case all its members should plunge into the guilt of a common crime.

This would in effect be saying to any tribe: If a few of your young and criminal members steal from us, you must pay our loss; but if you will all ratify what has been done, will unite to do us additional wrong and aggravate the mischief, and will only get enough of your people together to oblige us to bring soldiers to punish you, then you shall all go free. Such a policy would encourage wars, and tend to make every petty piece of pilfering a stimulus to a foray of the whole tribe.

This theory of tribal liability caused, or at least contributed to cause, the Bannock outbreak of 1878. Gen. Howard's dispatch of June 12, 1878, says:

"Difficulty began by a drunken Indian; then Buffalo Horn said, as Captain Bainbridge would hold full tribe responsible, they might as well go to war at once, taking horses and other property." (Record, p. 19.)

Still further, the choice of this particular phrase, *in amity*, indicates a purpose to express something else than merely a state of peace. If one wishes to say that two nations are at peace one naturally says that they are at peace. This is the simple, natural, obvious, usual and peculiarly proper expression to convey the idea, and the one which would most readily occur to any one, whether learned or unlearned. To express merely a condition of peace, the phrase *in amity* would be awkward, and un-

usual and would savor of pedantic affection. It would moreover be inaccurate, because two nations may be in a state of amity without being at peace, as peace is ordinarily and popularly understood.

Now, when we find that Congress has departed from the beaten track of expression, has avoided limiting the jurisdiction of the Court of Claims to cases arising when Indians are at peace, and has chosen a phrase which strikes the casual reader by its singularity, it is fair to infer that something was meant other than what would be meant by the phrase *at peace*. When the act speaks of tribes in amity, it must be presumed that Congress did not employ a word of foreign derivation and infrequent use to express simply that condition which could have been better, more intelligibly and more accurately described by a vernacular term which we learned before we went to school. This choice of the word *amity* rather than of *peace* necessarily makes the question one of status and brings the case within the well settled and accepted rules of international law. The court is no longer at liberty to view merely the external appearance and visible condition of the tribe; it must look back of this and ascertain the political standing of the tribe, and find what was its corporate action.

The understanding of Congress as to the meaning of the phrase in question is further shown by the action of that body upon the claims arising from spoliations by the French in 1798-1800. Mention has been made above of the decision of the court in Gray v. U. S., holding that the hostilities of that period did not amount to war, and that those who lost property by French depreda-

tion were entitled to indemnity. This decision was reported to Congress, as required by the statute referring the cases to the Court of Claims; and at later dates the court laid before Congress its findings in a large number of spoliation cases. By an act of March 3, 1891 (26 Stat. at L., 897), an appropriation of $1,300,000 was made to pay the amounts found due by the Court of Claims under the doctrine laid down in Gray's case. This would seem a legislative approval and adoption of the doctrine of that court as to what constitutes war. On the same day the Indian depredation act was approved which provided indemnity for losses by Indians in amity with the United States, and this act referred the cases to the same court which had held that actual hostilities did not of themselves constitute a breach of amity. It is not to be supposed that the same Congress which had just paid over a million of dollars in pursuance of the decision in Gray's case, intended that the same court should make a different definition of amity in an act passed on the same day. Had the Indian depredation act made peace, instead of amity, the condition of indemnity, it might have been inferred that a distinction was intended between this class of cases and the French spoliation cases, in which peace did not exist. But when the Court of Claims declined to consider actual hostilities as defeating the right to indemnity in the latter class of cases and had made those claims depend upon a question of status, the selection of the word *amity* in the Indian depredation act, a word which itself signifies status, clearly imports a purpose to adopt the

views of the Court of Claims and make them applicable to these cases.

The theory that indemnity was not intended for depredations committed by the entire tribe, is negatived by the language of the statute. In section 5 it is provided that "the court shall determine. . . . . the *tribe* of Indians *or other persons* by whom the wrong was committed." The words *or other persons* may fairly be supposed to mean individuals as distinguished from the tribe, but at any rate the liability of the tribe for its tribal acts is clearly implied. The same section provides further "that the amount of any judgment so rendered against any tribe of Indians shall be charged against *the tribe by which, or by members of which*, the court shall find that the depredation was committed." Here is the same distinction between the tribe and individual members of the tribe; but there is no implication that individual depredations shall be paid for and tribal depredations go unpaid. On the contrary, indemnity is expressly provided for both classes of depredations, and the two classes are distinguished only for the purpose of making the relief extend to both.

A consideration of antecedent legislation and of the circumstances under which the law of March 3, 1891, was enacted, will show that Congress intended no distinction between claims based upon individual acts of depredation.

As early as May 19, 1796 (1 Stat. at L., p. 472), an act was passed providing:

"And be it further enacted, That if any Indian or In-

dians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage upon any such citizen or inhabitant. his representative, attorney, or agent, it shall be the duty of such citizen or inhabitant to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose, who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction in a reasonable time, not exceeding eighteen months; then it shall be the duty of such superintendent or other person authorized as aforesaid to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury. And in the meantime, in respect to the property so taken, stolen or destroyed. the United States guarantee to the party injured an eventual indemnification: Provided always, That if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act by seeking or attempting to obtain private satisfaction or revenge, by crossing over the line, or any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: And provided also, That nothing here contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of

any Indian having so offended: And provided further, That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by an such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong."

Other acts of similar tenor and almost identical language were afterwards passed, as follows:

March 3, 1799, 1 Stat. at L., p. 747.
March 30, 1802, 1 Stat. at L., p. 143.
June 30, 1834, 4 Stat. at L., p. 729.

By an act of February 28, 1859 (11 Stat. at L., 401, Sec. 8), Congress repealed so much of the existing act, that of 1834, as promised eventual indemnification by the United States; but by an act of May 29, 1872 (17 Stat. at L., 190, Sec. 7), now incorporated into the Revised Statutes as Sec. 466, it was provided:

"The Secretary of the Interior shall prepare and cause to be published such regulations as he may deem proper, prescribing the manner of presenting claims arising under laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented, subject to the regulations prepared by him; and no payment on account of any such claim shall be made without a specific appropriation therefor by Congress."

In the report of the Senate Committee on Indian depredations presenting to the Senate the bill which was

enacted as the statute under consideration, Mr. Moody, on behalf of the Committee, reviewed this legislation and said:

"It is hoped by the committee that if Congress shall enact this measure into a law it will speedily put an end to all the numerous cases that have arisen out of depredations wrongfully committed by Indians, and will subject all such claims to the careful scrutiny of the courts, so that just ones may be paid in such sums as shall be reasonable and right, and improper one rejected. The argument in favor of the passage of such a measure cannot be too strongly emphasized. Almost from the inception and organization of the government it has taken upon itself the exclusive and indisputable control of the Indian tribes within the borders of the nation; it has arbitrarily excluded from the Indian country all citizens, save those expressly authorized by law to enter therein. In the interest of preserving peace between the Indian and the white race, it has undertaken to prevent the white man from pursuing any remedy against the Indian for wrongs committed by robbery, by arson, or by theft. It has thrown a shield around its Indian wards effective to prevent his being subjected to any processes similar to those existing against the whites.

"As a compensating course therefor, from a very early period in the history of the government, it has undertaken to itself procure reparation from the Indian and to guaranty to the party injured an eventual indemnification.....

"But throughout these statutes runs the doctrine of the obligation of the government to see that the white man is indemnified for these unlawful injuries: First, out of the Indian fund, and that failing, out of the government treasury; and also the doctrine that the white

man should pay twice the value of the property which he injured or destroyed and a like eventual indemnification by the United States.

"The provision granting indemnity to Indians for losses occasioned by white persons has never been repealed. It still is an existing enactment, and is contained in sections 2154 and 2155 of the United States Revised Statutes.

"The reciprocal obligation to the citizens of the United States to pay them for depredations committed by Indians has been subjected to several statutory amendments, though in each of them the principle has been recognized that it was the duty of the United States to cause indemnification to be made out of any available funds belonging to the Indian tribe, and in the more recent enactments, and by many appropriations therefor, the recognition of the obligation to eventually indemnify the citizen for such losses has been renewed. . . . . .

"Thus it will be seen that from May 19, 1796, to February 28, 1859, a period of about sixty-three years, the policy of requiring the Indians to pay for the unlawful depredations committed by them against the whites, and of requiring the whites to pay for the unlawful injuries committed by them against the Indians, and an eventual indemnification to each class in case the effort to make the party committing the injury pay failed, was in active force, and payment for claims for Indian depredations was made out of the public treasury without special appropriation by Congress.

"After the passage of the act of 1859, such payments continued where the Indians had annuity funds, down to July 15, 1870, when, by an act approved on that date (16 Statutes, 360, section 2098, Rev. Stat.) it was provided that thereafter no claims for Indian depredations should be paid until Congress should make special ap-

propriation therefor. This did not repeal the existing law in relation to Indian depredations; it merely affected the mode of payment. It nevertheless recognized by its terms the fact that Congress would and should make appropriations for such purpose. The provision of the act of June 30, 1834, as modified by the act of February 28, 1859, has been incorporated into the Revised Statutes of the United States, and is section 2156 thereof.....

"On May 29, 1872, an act was passed (17 Statutes, 190, section 7, now appearing in section 445 Revised Statutes) requiring the Secretary of the Interior to make an examination of the Indian depredation claims presented to him and report them to Congress with his allowance or disallowance and the evidence upon which his action was based.

"This was a practical return to the ancient policy of the government and a renewed recognition of the liability of the United States. It plainly contemplated payment by Congress of claims presented to the Secretary of the Interior and allowed by him, but gave a further protection against unjust claims by securing a re-examination of the evidence by the committees of Congress. From year to year the Secretary of the Interior has reported to Congress numerous claims of this class, both allowed and disallowed. A few of these cases have been paid by special appropriation acts therefor by Congress, but many of them remain unpaid.

"Since then several appropriations have been made by Congress for the purpose of continuing the investigation of claims for Indian depredations. By the act of March 3, 1885 (23 Statutes, 376), an appropriation of $10,000 was made to enable the Interior Department to make such additional investigations of claims for Indian depredations. Further appropriations have been made by the following acts: Act of May 15, 1886 (24 Statutes,

44), $20,000; act of March 2, 1887 (24 Statutes, 464), $20,000; act of June 29, 1888 (25 Statutes, 234), $20,000; act of March 2, 1889 (25 Statutes, 998), $20,000.

Sen. Rep. 1016, 51st Cong., 1st Sess.

For nearly one hundred years the statute books have pledged to the citizen the faith of the government that losses by Indian depredations shall be paid from tribal funds in the hands of the government; and for the same period, excepting the years between 1859 and 1872, there has been the additional promise that such losses should be paid by the government itself if the tribal funds should not suffice for that purpose. The act of 1891 is only the last of a series of statutes to the same effect, the culminating of a settled policy co-extensive almost with the national history.

The reasons upon which that policy is founded are not far to seek. The government is bound to protect its citizens against foreign aggression, and it is peculiarly bound to restrain the ravages of Indians. These are its subjects, and over them it exercises jurisdiction and is obliged to exercise a control, exclusive of all state or local authority. The reservations upon which the Federal government has settled these tribes are sacred ground, into them no process runs from state courts, the individual cannot enter them to reclaim his stolen property or even to petition for redress, and to the wrong-doing Indians they are cities of refuge where under the ægis of national authority he can mock the victims of his rapacity and revenge. Having thus taken the Indians

under its protection, the Federal government is in justice bound to atone for their misdeeds.

The Federal promise of eventual indemnification is based moreover upon a desire to prevent individual efforts to obtain redress of wrongs and so to preserve peace between the citizen and the Indian. To this end it is, by all the statutes, made a condition of indemnity that the sufferer shall not seek private revenge or satisfaction. The obvious purpose of this provision is to prevent the depredations of Indians from ripening into war, and to relieve the government from the expense and complications attendant upon collisions between Indians and settlers.

The government having thus afforded the Indian peculiar protection against the consequences of his wrongdoing, and thus deriving great advantage from the forbearance of its citizens, it is not perceived how its moral obligation to indemnify its citizens for the outrages committed by its Indian wards is lessened by the fact of war. If a robbery committed by one Indian merits compensation, there is no reason why a thousand robberies perpetrated by a thousand Indians should be less meritorious, or why the deeds, which committed by individuals would be depredations, should be sanctified and legitimated because committed by a band, tribe or nation.

Indeed, the larger depredations, committed by large bands or whole tribes, extending over larger regions and longer periods of time, seem rather more than indivdual acts, to charge the government with responsibility. Acts of private plunder, the robbing of hen roosts, the

pilfering from gardens, the stealthy burglary of farm houses, and the midnight robbery of stables, are not matters for which the government is especially responsible, and are not losses for which government usually pays. Against such acts the vigilance to be exercised should be that of the individual and not of the state. But against extensive raids, overwhelming force, and warlike operations of large bands, the citizen's vigilance and individual valor are of no avail. Here is where the protection of the state is needed, and in just such cases does the duty of protection exist. It is safe to say that most of the Indian outbreaks in our history are traceable to the negligence, the supineness or the incompetency of public officials, and many of them to the actual corruption and crime of the agents of the government. In this instance of the Bannock outbreak, it appears from the record (p. 4) that the Indians went upon the warpath because of the failure of the government to issue rations in accordance with treaty stipulations. No doubt in the majority of cases some similar neglect on on the part of the government, or some blunders or misbehaviors on the part of its agents, will be found to have caused the Indian hostilities. And in the majority of cases it will appear that the ravages of the Indians might have been prevented or repressed had the government exercised its military power promptly, providently and efficiently. On moral grounds, the responsibility of the government is greater in case of tribal war than in that of merely personal depredation. The statute providing indemnity for Indian depredations was not prompted by a few isolated instances of petty

larceny on the part of Indians, nor even by more tragic cases of individual murders done by way of private revenge. The stories which appealed to Congress were histories of Indian insurrections and tribal forays, in which vast regions were laid desolate, villages burned, citizens slaughtered, women ravished, children brained and troops routed by overwhelming forces of savages. It was the very fact that such disasters had been allowed that charged the government with the duty of redressing the wrongs to which it had exposed its citizens.

In the practical administration of the various statutes allowing indemnity for Indian depredations, it does not appear that any distinction has ever been made between losses incurred in time of peace and those resulting from so-called Indian wars. The finding of the court below (No. XIV, Rec., p. 14), that Congress has refused to pay claims arising during a state of war, relates entirely to claims reported by the Secretary of the Interior since 1872, in which year that officer was charged with the duty of investigating cases of depredation, and during this period no general provision has been made for the payment of such claims whether arising in peace or in war.

The Court below finds that "Congress has refused to pay depredation claims where the tribe charged was at war with the United States on the ground that "these losses were incident to a state of war with savage tribes," referring to two reports of Congressional committees. An examination of these reports will show that they do not go upon any distinction between a state of war and a state of peace. In H. R. Report No. 932,

25th Cong., 2nd Sess., May 15, 1838, the Committee on Claims recommended adversely to the payment of certain losses sustained by citizens of Alabama during the Creek war, on grounds stated as follows:

"The government is equally bound to protect the property of our citizens employed in commerce as it is to give protection to those whose capital is employed in agriculture. If the Malays or pirates seize a vessel, murder the crew and take the cargo to their use, no one would say the United States were bound to remunerate the loss. A misunderstanding may exist between this government and a foreign power, by which the millions employed by our citizens in commerce and navigation may be swept from the ocean and rendered valueless; and yet no one would remunerate the sufferers from the Treasury of the United States. Thousands of such sufferers now exist and they have combatted poverty for years without relief. Such is the case with those who have suffered by Indian depredations on the frontiers as the settlements have progressed west and southwest, and by those who suffered in the war with Great Britain which commenced in 1812.....

"If the amount of this class of claims in 1800 was an impediment to making a favorable report on the claims then under consideration, how fearfully has it increased in the years that have intervened, within which we have had an embargo, a non-intercourse act, a war with England, a violation of our neutrality by the belligerent powers of England and France, and almost a constant collision with some of the Indian tribes, by which the property of our citizens has perished at our wharves or been destroyed on the ocean or on land. The obligation of the government is not to remunerate such losses, but

to prevent their occurrence, as far as is practicable; this the memorialists do not allege has not been done."

H. R. Report No. 1028, 25th Cong., 2nd Sess., July 2, 1838, recommends against payment for similar losses and on indentical grounds. The report cites the embargo of 1807 as a measure destructive to the property of many citizens engaged in commerce, and notes that such losses afforded no claim for indemnity; the report proceeds:

"No government can equalize the burdens incident to the adoption of restrictive measures against the aggressions of foreign powers, nor such as are incident to a state of war, it is vain to attempt it."

In this report is quoted a passage from an earlier report on a similar claim, H. R. Rep. No. 351, 25th Cong., 2nd Sess., in which it was said:

"These losses were incident to a state of war with savage tribes on the western frontier. They bear oppressively on settlers exposed to the unrestrained revenge of the Indians, but it has not been the practice of the government to remunerate for such losses, and it may be doubted whether it is within the constitutional power of the government to do it.....

"The destruction of the property of our citizens on the frontier by a tribe of Indians may be a good cause of our going to war, and so may the capture of our vessels on the ocean be a good cause of war against the nation whose subjects have thus disregarded their moral, social and national obligations; but in neither case has the sufferer a claim on the United States."

The most that these reports can be said to show is that one committee of a single Congress was opposed to the policy of compensating citizens for losses by Indian depredations. The argument of the committee is not against paying losses incident to a state of war but against the payment of any losses at all. The losses mentioned are not particularly from depredations committed during the existence of tribal hostilities, but include isolated and individual cases, and the depredations of Indians are put in the same category with the robberies of pirates and the damages resulting from political measures like the embargo, matters which are clearly not incident to a state of war. So far as the question of policy goes, that is not open to argument. It is sufficient to say that the government has deemed it wise and just to pay for depredations committed by Indians, thereby distinguishing such losses from those inflicted by "Malays or pirates" or those caused by embargoes and other "restrictive measures against the aggressions of foreign powers." The question now is, whether this policy excludes losses incurred during hostilities involving greater or less portions of the tribe.

From the report of Senator Moody, cited above, it appears that until July 15, 1870, it was the practice of the Indian Office to pay claims for Indian depredations out of tribal annuities or other funds, without any special appropriations by Congress. On the date mentioned, an act was passed forbidding the continuance of this practice and requiring Congressional action for the payment of such claims. It does *not* appear that any distinction was made between claims arising in time of war and

those arising in time of peace; and from the subsequent practice of the Interior Department, to be mentioned below, it is extremely unlikely that any such distinction was recognized.

During the same period a number of special appropriations were made by Congress to compensate citizens for losses due to Indian depredations, a list of which is added to H. R. Report, 3117, 49th Cong., 1st Sess., Appendix C, *supra*. It is impossible to say what and how many of these losses were incurred during tribal hostilities, because, for reasons stated above, there are no definite criteria by which to distinguish a state of war with Indians. But in the following cases, among others, it would seem that the condition of war, in the sense of tribal hostilities, was as well defined as in the instance of the Bannock outbreak of 1878.

> Act of June 28, 1834, 4 Stat., 705, $7,800 is appropriated to pay for property stolen or destroyed by Seminoles.
>
> Act of June 30, 1834, 4 Stat., 721, $250,000 appropriated to pay for depredations by Creeks prior to 1802.
>
> Act of June 19, 1860, 12 Stat., 44, 58, $16,769.74 is appropriated to pay for losses of citizens of Minnesota and Iowa due to the Sioux at Spirit Lake in 1857.
>
> Act of February 16, 1863, 12 Stat., 652, 658, provision is made for losses by the Sioux outbreak of 1862.
>
> Act of May 28, 1864, 13 Stat., 92, appropriation is made to pay the same losses.
>
> Act of June 10, 1872, 17 Stat., 52, appropriates

$30,000 to pay the heirs of Alex. Watson "for property lost, captured or destroyed in Florida during the Indian hostilities commencing in 1835."

In addition, the following instances are mentioned in Mr. Moody's report, *supra*, in which the losses appear to have been incident to tribal warfare, or at any rate to hostilities on a large scale:

21 Stat., 87, appropriation to pay for depredations committed by Cheyenne and Araphoe Indians during a raid through Kansas and Indian Territory.

23 Stat., 95, appropriation to pay claims incident to a raid of the same Indians in 1878.

23 Stat., 96, appropriation to pay damages done by Ute Indians at the time of the White River Massacre in 1879.

With respect to the practice of the Government since the act of May 10, 1872, we have the express finding of the Court below that no distinction has been made between claims arising in times of war and those arising in times of peace (Record, pp. 12, 13). It is true, as is said by the Court in its Finding XIV. (p. 14), that Congress has failed to pay for depredations committed while the tribe was at war, but the same is true of all the claims laid before that body.

The Interior Department, which has since 1872 been charged with the investigation of these claims, has examined and allowed them without regard to the existence of peace or war. The failure of Congress to act on the departmental reports is not a disapproval of them and indicates no greater disfavor to one class of claims than to another. Had Congress paid for depredations

done by individuals and left unpaid those incident to tribal hostilities, the case would be different. But so long as neither class has been paid, it is impossible to say that Congress disapproved of the Departmental allowance of claims arising during tribal hostilities.

On the contrary, the fact that Congress, being fully advised of the Departmental construction of the phrase *in amity*, adopted that phrase in the act referring these cases to the Court of Claims, signifies a legislative adoption of the then accepted meaning of that phrase:

The Abbotsford, 98 U. S., 440.
McDonald v. Hovery, 110 U. S., 619.
Duramus v. Harrison, 26 Ala., 326.

That the construction given a statute by the executive officers charged with its administration is entitled to great respect, is a settled maxim of this court.

U. S. v. Moore, 95 U. S., 760.
Edwards v. Darby, 12 Wheat., 206.
Surgett v. Lapice, 8 How., 48.
Brown v. U. S., 113 U. S., 568.

All the statutes providing for, or promising payment for, Indian depredations, employ the phrase *in amity*. In the practice of the legislative and executive branches of the Government there has been no distinction between depredations incident to a state of war and those committed during a condition of peace. The act of March 3, 1891, presumably employs the phrase in the sense in which it had heretofore been understood, and it is submitted that it is too late to interpret it as signifying a

distinction between tribal acts and the crimes of individuals.

For these reasons, it is submitted that the phrase *in amity*, as employed in the act of 1891, is not to be read as synonymous with the phrase *at peace*, or as necessarily exclusive of actual hostilities. It designated a certain tribal status, a condition of the tribe in its political aspect, to be determined from the official and published declarations of the political authorities. It is a phrase which aptly identifies all tribes within the national borders, because such tribes cannot be otherwise than in amity with the United States. Or, if other than the status of amity may exist in the case of such tribes, the altered status must appear by matter of record, and it is not to be presumed or even to be inferred from the mere fact of military operations. And because the present record does not purport to show more than the fact of certain armed collisions between the Federal troops and certain members of the Bannock tribe, it is error to infer that the amicable relations between the tribe and the United States were superseded and that a condition opposed to amity existed.

V.

The Court of Claims erred in failing to hold the present case to be within the jurisdiction conferred by the second clause of the first section of the act of March 3, 1891.

The foregoing argument applies to all cases of unlawful depredations committed by domestic Indians, irres-

pective of the treaty relations or conventional obligations of such Indians. There is, however, a second clause conferring jurisdiction upon the Court of Claims, a clause which applies peculiarly to those tribes which, like the Bannocks, had treaties with the United States, and which committed depredations in contravention of treaty stipulations. The portion of the statute referred to reads:

"Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided."

If the argument of the appellants as to the meaning of the phrase *in amity* be considered unsound, it must, as it seems to counsel, be conceded that the Court of Claims is here given a jurisdiction which is independent of the amity of the Indians. Assuming that under the first clause the test of jurisdiction is amity, the second clause defines an additional class of cases and prescribes a test of jurisdiction into which the tribal amity certainly does not enter. It remains to consider the limits of that additional jurisdiction as fixed by the statute. The act of March 3, 1885, herein referred to for a des-

ignation of the cases authorized to be examined, reads upon this subject as follows:

"Indian depredation claims. For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also such claims as are pending but not yet examined, on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, with a reference to the date and clause of the treaty creating the obligation for payment, to be made and presented to Congress at its next regular session."

This act clearly authorizes examination of, at least, all claims for depredations "chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States," not then barred by limitations. By subsequent acts of May 15, 1886, 24 Stat., 44, and March 2, 1887, 24 Stat., 464, the Secretary of the Interior was required to include in his examination and report all such claims notwithstanding the bar of limitation. And by the act of March 3, 1891, Sec. 2, all questions of limitation are waived except in certain cases of which that at bar is not one.

It seems, however, to counsel for appellants that the act of March 3, 1885, in the passage above quoted, does not undertake to define the jurisdiction of the Interior

Department, but, by its directions as to the preparation of lists, merely to regulate the manner of exercising that jurisdiction. The act appropriates money "for the investigation of certain Indian depredation claims" and appears to assume that the class of claims subject to investigation is already defined by existing law. The language presupposes an earlier law conferring jurisdiction and prescribing its limits. And, at the date of this act, the Interior Department already possessed and was exercising such a jurisdiction under the provisions of the above quoted act of May 29, 1872, sec. 466, Rev. Stat. It is, therefore, to this statute that reference must be had to ascertain what claims were authorized by the act of 1885 to be examined by the Secretary of the Interior and were by the act of 1891 placed within the jurisdiction of the Court of Claims.

Under Sec. 466, Rev. Stat., the Secretary of the Interior is required to consider "claims arising under laws *or treaty* stipulations for compensation for depredations committed by Indians." It follows that the Court of Claims has jurisdiction in the whole of that class of cases, including those arising under treaty stipulations

Under this provision the amity or enmity of the tribe at the date of the depredation is immaterial. If the tribe had obligated itself to pay for its torts, it is no defense to say that the tribe had declared war and thereby made its ravages more extensive and less easily prevented or resisted.

It is true that between independent nations some treaties are abrogated by war. But in this instance the hostilities occurred after the act of March 3, 1871, Rev.

Stat., Sec. 2079, which prohibits the acknowledgment or recognition of any Indian tribe as an independent nation, and we are precluded from according to the tribe the capacity to nullify its antecedent solemn engagements by its own acts in violation of those engagements. To hold that a tribe may release itself from its obligation to remain at peace by merely going to war is to make the treaty as if written in water.

In this particular instance there was never on either side supposed to be an abrogation of the treaty. By section 2080, Rev. Stat., the President is authorized by proclamation to declare abrogated all treaties with any Indian tribe when such tribe is in actual hostility to the United States, if in his opinion the same can be done consistently with good faith and national obligations. No such action was ever taken by the President in the case of the Bannocks. On the part of the Indians there is no indication that they considered the treaty abrogated. On the contrary we find them shortly after the suppression of their outbreak domiciled as before on their original reservation and negotiating the sale of a part of it to the United States. The appropriations for their annuities and subsidies went on without interruption and in accordance with the terms of the original treaty, and it is nowhere mentioned that they declined to avail themselves of the appropriations on the ground that the treaty was abrogated or on any other ground. Under these circumstances, both parties choosing to regard the ante-bellum treaty as still in force and continuing to conform to its stipulations, it is impossible to say that any stipulation of that treaty was abrogated.

Nor does it lie in the mouth of the Indians to claim release from their obligations while consenting to enjoy the benefits of that treaty.

This was certainly the view taken of this class of cases at the Interior Department, as appears by express findings of the Court below (Rec. 12, 13). A great many of these cases had been reported to Congress, each accompanied by reference to the treaty supposed to bind the tribe to indemnity; and it must be presumed that Congress knew that the Secretary of the Interior had construed the existing legislation on the subject as authorizing him to examine claims against all tribes in treaty relations. In making the jurisdiction of the Court of Claims co-extensive with that exercised by the Secretary, the legislature clearly intended that the Court should adopt the then accepted limits of that jurisdiction. It is expressly provided that the jurisdiction shall cover all cases which at the date of the act had been examined and allowed by the Interior Department. As to these cases there is no room to doubt that the Secretary's construction of existing law was adopted, and the allowed cases must certainly be held within the jurisdiction of the court. It can not, then, be held that pending cases are excluded from the jurisdiction, unless it is assumed that Congress intended to discriminate between allowed and pending cases, to run a line of demarcation with reference to the purely accidental circumstance of previous Departmental action. Such a distinction finds no support in the text of the act, and is contrary to its plain purpose to place all Indian depredation cases within the jurisdiction of the court. The statute goes further and

provides that the allowance of a claim by the Secretary of the Interior shall be final and judgment shall be given accordingly, unless either party elects to reopen the case, in which event the party so electing shall have the burden of proof (section 4). This is certainly an approval of the departmental definition of the limits of its jurisdiction, an adoption of the departmental view of existing law on that point.

By the treaty of 1868 between the United States and the Bannocks, *supra*, the latter had agreed as follows:

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor."

The court below holds, as appears from the opinion, that the claimants are precluded from recovery under

this article because they failed to follow the prescribed procedure and to make complaint to the Indian agent. The assumption is that the act provides relief only in those cases where there had been exact compliance with the terms of the particular treaty under which indemnity was stipulated for.

In this instance the statement in the opinion of the court is unsupported by anything in the record. Neither party requested a finding upon the question whether the claim had been presented to the Indian agent, and the court makes none. For all that appears in the findings, the claim may have been prosecuted diligently and in exact conformity with the course marked out in the treaty.

It does appear, however, and the fact is so found by the court (Rec. p. 4), that this claim was presented to the Commissioner of Indian Affairs for investigation, and was pending, unadjudicated, before that officer at the passage of the act of 1891, transferring this class of cases to the Court of Claims. The claimants made averment to this effect in their petition, and evidently considered it immaterial what previous efforts for recovery had been made, and that it was sufficient under the statute to show presentation at the Indian Office. It is submitted that this view of the law was correct and that the Court of Claims erred in holding other proof to be requisite.

The act of 1891, in the jurisdictional clause above quoted, transfers to the Court of Claims the jurisdiction exercised by the Secretary and continues that jurisdiction in the court. It has already been argued that this stat-

ute adopts for the measure of that jurisdiction the limits fixed by the Interior Department and then recognized in the daily practice of that Department; and it has been shown, from findings of the court below, that the authority exercised by the Secretary included all cases arising under treaty stipulations and all claims referable to such stipulations. If, therefore, this case was such a one as would have been examined at the Indian Office, it is within the jurisdictional provision of the act of 1891.

In view of the legislative adoption of the departmental practice, and the implied approval of the Secretary's course, it is really of no consequence whether that officer was right or wrong in his views as to his authority. Inasmuch as he habitually examined and reported favorably upon claims which had not followed the procedure marked out by the various treaties, and as his action in this regard had received endorsement by Congress, it must be held that the statute neither requires not authorizes the Court of Claims to inquire into the antecedent history of a claim, and to reject every claim which had not been prosecuted in a narrow conformity with the course prescribed by treaty.

In point of fact, however, the practice of presenting claims of this character to the Indian Office was established by law to supersede the presentation to the Indian agents and the other details of the course fixed by treaty, and prosecution before the Indian Office was a statutory substitute for the methods prescribed by the various treaties. The act of May 20, 1872, Rev. Stat., sec. 466 *supra*, created a new jurisdiction in the Interior Department, and conferred upon the Secretary power to hear

and determine all claims under existing laws or treaty stipulations, and to prescribe regulations for the presentation and prosecution of such claims. This act authorizes a practice, which is at least concurrent with that prescribed by the treaties, if it does not entirely supersede the uncertain and unsatisfactory methods indicated by the treaties. Certain it is that after the year 1872, the great mass of depredation claims were filed in the Indian Office, and very few, if any, were presented to the Indians or their agents in the field. The manifest purpose of the act of 1891 was to transfer this mass of claims, accumulated at the Interior Department under the act of 1872, to the Court of Claims for judicial action in place of executive investigation. If, therefore, a case was properly presented to the Indian Office under the act of 1872 and in conformity with the regulations authorized by that act, the case is within the jurisdiction of the court without regard to any procedure marked out by treaty. If the tribe had obligated itself to pay for its depredations, the Secretary of the Interior had authority to adjudicate the case, and so has the court. And the court is no more at liberty to decline jurisdiction, on the ground that the treaty has not been followed in the manner of presentation, than the Secretary was at liberty to decline jurisdiction, on the ground that his own authority was not conferred by the treaty stipulations. The Secretary took jurisdiction under an act of Congress which may have overridden some stipulations of some treaties, but which was at any rate paramount to any anterior treaty stipulations. The Court of Claims succeeds to this jurisdiction in its entirety and subject

to identical limitations. It cannot inquire how far the authority resting upon statute is inconsistent with a treaty, or whether any particular claim presented to the Secretary was or was not also prosecuted in accordance with tribal agreements.

Indeed, express language of the statute is to this effect. Section 2 provides "that all questions of limitations as to time and manner of presenting claims are hereby waived and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the government," the only proviso being to exclude claims arising prior to 1865 and not pending at date of the act. This unquestionably overrides and supersedes all treaty stipulations as to procedure and limitations, and makes it impossible for the court to deny a claim upon the ground of failure to prosecute in the manner originally stipulated for.

The present claim is, therefore, within the jurisdiction of the Court of Claims because it was not only of the class authorized to be examined by the Secretary of the Interior, but was actually presented to that officer and pending before him at the passage of the act of 1891.

The claim being thus placed within the jurisdiction of the court, the amity of the Indians is immaterial. The gist of the claim is a violation of treaty stipulations; and if the depredation was committed in violation of a treaty, it is to no purpose to say that the treaty was violated by the tribe which made it. The treaty is the act of the tribe collectively, and it is as much violated by the tribal acts as by individual crimes. The Bannocks

in this instance had pledged themselves to keep peace, and they certainly violated that pledge if they went to war. They bound themselves to pay for the depredations of their bad men, and, as it appears that the depredation in question was committed without provocation, the necessary inference is that it was the act of some very bad men. It is difficult to see how such an obligation can be escaped by merely showing that a very large number of bad men participated in it and that the wrong was accompanied by circumstances of unusual aggravation.

But, conceding that the tribe was not liable for this depredation under its treaty, it is submitted that such absence of Indian liability does not affect the right of the claimants to indemnity under the act of 1891. It might be granted that the fact of war releases the tribe from liability for its acts; that the United States accords to the Indians such a quasi-national and semi-sovereign character as to enable them to abrogate treaties by going to war; and that the Bannocks had this prerogative in 1878, seven years after the act of 1871 had declared that they were not a sovereignty. It might be admitted that, on these accounts, the tribe could not be held under its covenant for indemnity. But all these concessions, if they could be made, do not at all touch the jurisdiction of the Court of Claims under the act of 1891, nor do they affect the relief which that act holds out to those who have suffered by Indian depredations. The proposition of appellants is, that the liability of the tribe under its treaties is not essential to the jurisdiction of the court nor to the liability assumed by the United

States in the Statute of March 3, 1891. On the contrary, that statute prescribes its own test of jurisdiction and lays down its own rules as to liability, and does not make the right to indemnity depend upon any pre-existing rules, laws or treaty stipulations.

Distinction must be observed between the violation of a treaty by an Indian tribe and the liability of that tribe to pay for such violation. The breach of a treaty is one thing. The legal obligation to indemnify for such a breach is another. When a treaty is broken, there may be a legal obligation to atone for it or there may not be. But whether or not the legal obligation exists, the fact of the violated treaty remains. In the present instance, it might be conceded that the Bannocks released themselves from liability by making war, but there is no doubt that they broke their pledge to keep the peace, and in so doing inflicted loss to the claimants.

Under the second clause of the first section of the act of 1891, the test of jurisdiction is the breach of treaty, not the liability of the Indians on account of such breach. That clause adopts by reference to previous acts the jurisdiction then possessed by the Secretary of the Interior and transfers it as it stood to the Court of Claims as fully as if these acts had been in so many words repeated and incorporated in that clause, *verba relata inesse videntur*, Broom, C. L., 510. It has already been shown that under existing law, as it had been construed for many years with the knowledge of Congress, the jurisdiction of the Secretary extended to violations of treaty stipulations. As has also been shown, that jurisdiction, in its practical exercise, extended to cases where the tribes were in

actual hostility to the United States. It has been further remarked that the practice of seeking relief through the Interior Department was a statutory substitute for the procedure stipulated for in most or all of the treaties, and was established without reference to, and perhaps in purposed disregard of, many treaty stipulations. It is clear that the right of the Secretary to investigate, and such right as he had to give relief, was not measured by the terms of any treaty and was not, nor was it supposed to be, dependent upon the existence of any liability on the part of the Indians, but was, by express statute and by usage, dependent upon the fact of a violated treaty.

The jurisdiction of the Secretary was exercised under the act of May 29, 1872, Rev. Stat., Sec. 466, *supra*. The relief which he was empowered to give consisted merely in reporting the claim to Congress, with his findings of fact. Clearly the making of findings was not dependent upon the existence of tribal liability, and did not presuppose any such liability. And the provision in the same act, "that no payment on account of such claims shall be made without a specific appropriation therefor by Congress," seems to contemplate that findings of loss might be made in cases where neither the Indians nor the United States were liable.

Neither is the class of claims subject to departmental investigation limited by any suggestion of liability on the part of Indians. That class is defined by the act as "claims arising under existing laws or treaty stipulations for compensation for depredations committed by Indians." The language is broad enough to cover all claims for losses by Indian depredations in violation of

treaty stipulations, irrespective of the legal, or even of the moral, obligations of the Indians to pay for them. It does not require an existing liability on the part of the Indians or of anybody else. It is sufficient if there has been a treaty stipulation, a violation of the stipulation, and a loss. In short, it is the violation of any conventional obligation on the part of Indians which make jurisdiction, and not the existing liability to indemnity.

The act of 1872 having conferred such jurisdiction upon the Secretary of the Interior, the act of 1891 transferred the same jurisdiction, with identical limits, to the Court of Claims. The second clause of the first section adopts the existing boundaries of the Secretary's authority, the same boundaries as fixed by existing law and the practical construction of that law, and declares that the court shall have jurisdiction "to inquire into and finally adjudicate" all the cases covered by that authority. There is no hint that the jurisdiction so conferred shall be limited by the liabilities of any Indian tribe, any more than was that exercised by the Secretary. It is not prescribed that the court shall determine the right of the claimant to relief according to the terms of some treaty or give him such relief as may be auauthorized by stipulations of enduring and existing obligation.

On the contrary, this clause says nothing at all about the principles upon which cases shall be tried or relief be meted out. Such matters as the right to indemnity and the liability to pay indemnity are no part of the subject-matter of that clause, but are provided for in subsequent parts of the act. The clause in question has

a purely jurisdictional function. Its only purpose is to define the class of cases which may be investigated, and not to lay down rules for adjudication. It fixes the limits of the court's power of inquiry, and there it stops, leaving other matters for other sections. In the second clause the court is directed to investigate certain cases; in what of these cases judgment shall be given, and how liability shall be fixed, are matters foreign to the purpose at this point of the statute.

There is, therefore, no ground for holding that this clause limits the jurisdiction of the court to cases wherein some Indian tribe is liable under some treaty obligation. If it was the purpose of Congress to ordain a court to administer merely rights under treaties, that purpose must be looked for elsewhere. Rights and liabilities under treaties are not hinted at in this part of the act. Treaties are referred to only as affording, by their violation, a test of jurisdiction. If the claim is for a breach of treaty, it is committed to the court for investigation If the fact of such a breach is found, jurisdiction attaches, inquiry must be made, and adjudication rendered.

Upon what principles adjudication must be made and liability fixed are other questions. And upon these questions other portions of the act are not silent as is the first section. On the contrary, the statute lays down some very clear and express rules on these points, and these rules are by no means identical with such as might have been deduced from consideration of treaty obligations and Indian liabilities thereunder. It does not appear that Congress intended the court to administer a

code of rights and equities based upon treaty stipulations, to adjudicate the binding force of one treaty or another, to decree indemnity or to refuse it according to the existing liabilities of each tribe resulting from its divers engagements as affected by divers circumstances. Having first placed within the jurisdiction of the court all cases arising from breach of treaty, the act fixes its own rules for the adjudication of such cases, and the United States assume certain liabilities which are indedendent of those sustained by any Indians and exceed those sustained by Indians generally. The jurisdiction having attached upon proof of a breach of treaty stipulations, the claimant's right to relief and his measure of indemnity are prescribed on principles that are not referable to any obligations or liabilities of the Indians.

With respect to the right to indemnity, there is in the whole of the act no reference to treaty obligations and no suggestion that any claim is to be tried by the terms of any Indian treaty. Neither is there any reference whatever to any liability existing on the part of any Indian tribe, upon which the claimant's right to recovery is to depend or by which that right is to be be measured. But the statute does provide:

Sec. 5. That the said court shall make rules and regulations for taking testimony *in the causes herein provided for* by deposition or otherwise.....that the court shall determine *in each case* the value of the property taken or destroyed at the time, and place of the loss or destruction, and, if possible, the tribe of Indians, or other persons by whom the wrong was committed, *and shall render judgment* in favor of the claimant or claimants

against the United States, and against the tribe of Indians committing the wrong, when such tribe can be identified.

Sec. 6. That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence, and education; and fourth, *if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States*: Provided that any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

What is the class of cases in which the court is to take testimony under its rules, to determine the value of property taken, and, if possible, by what Indians? The passage provides that all this shall be done "in the causes herein provided for." Where shall we look to ascertain the causes provided for? To the first section, of course, to the clauses which define the jurisdiction, to the clause which provides for the adjudication of all cases pending before the Secretary of the Interior and all cases

which that officer might examine on the allegation of violated treaty.

But section 5 goes further. It enjoins the court to "render judgment in favor of the claimant or claimants" in the "causes herein provided for." It is not required that the court shall ascertain whether any Indians are liable by reason of conventional obligations or fix the degree of their liability by reference to some treaty. The duty to render judgment is not made to depend upon considerations of this character, it is not limited to cases where treaty liability exists; it extends to all the causes placed within the jurisdiction of the court, to the entire class defined in the first section. Given a treaty stipulation and having proven a breach thereof, jurisdiction attaches. Having shown a loss, the right to a judgment is perfected.

When we come to the provisions fixing the liability for the payment of these judgments, the independent character of the statute and its indifference to pre-existing laws and treaty stipulations are even more manifest. The liability, whether of the United States or the Indians, is not referable to any existing law or treaty, and does not depend at all upon any past or present liability of the Indians. It is not fixed in accordance with any legal or moral obligation of any Indians under any treaty. The provision for payment of the judgment is peremptory and independent of stipulation. The claimant is to be paid from the Treasury of the United States. The government is to reimburse itself from funds due to the Indians where it can, to go without reimbursement when it must. But in neither case is the claimant's

right to indemnity gauged by the liability of the Indians or by their ability to pay. Neither in defining the primary liability of the government nor in defining the ulterior liability of the Indians is there the most remote reference to treaty stipulations or the slightest consideration of treaty liability.

The novel and independent character of this provision is most striking. The United States, after long years, make good their pledge of eventual indemnification, and assume liability for the wrongs of their wards. Their assumption of liability is made in unambiguous terms, and without reference to existing liability on the part of others. The liability of the Indians is likewise fixed without reference to their engagements, whether binding or dissolved. In the face of the clear language of the statute, and in consideration moreover of its peremptory thoroughgoing disregard of existing laws and treaties, it seems impossible to hold that the jurisdiction given to the Court of Claims is merely for the sake of administering a code of old statutory and treaty rights. Indeed, it appears to be the very purpose of the new act to supersede and make obsolete the pre-existing body of law, and to replace it with an equitable, uniform, and consistent scheme of adjustment. So far from referring to a thousand diverse statutory and treaty provisions applicable to various cases, and requiring the court to extract from that tangle of enactments and obligations the rule for each particular case, the act prescribes for all cases one uniform principle of liability and one identical measure of indemnity. The provision ignores all antecedent enactments, and puts all claims on a level.

For these reasons, when once a case is found to be within the limits fixed for the jurisdiction of the court, all question as to the rights of the claimant under former law is at an end, and the judgment and payment are to follow the terms of the act of 1891.

For these reasons it is submitted that the judgment of the Court of Claims should be reversed, and the case remanded to that court with directions to enter judgments for the claimants in an amount equal to the value of the property shown to have been lost.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SAMUEL MARKS, HYMAN WOLLENBERG, and B. J. Sideman, partners as Marks & Wollenberg, appellants,
v.
THE UNITED STATES AND THE BANNOCK and Pi-Ute tribes or nations of Indians, appellees.

No. 352.

STATEMENT AND BRIEF OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR THE APPELLEES, ON THE CONSTRUCTION OF THE ACT RELATING TO INDIAN DEPREDATIONS.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SAMUEL MARKS ET AL., APPELLANTS,
v.
THE UNITED STATES AND THE BANNOCK and Pi-Ute tribes or nations of Indians, appellees. } No. 352.

STATEMENT AND BRIEF FOR THE DEFENSE.

STATEMENT.

Under the act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891 (1 Sup. Rev. Stat., 2d ed., p. 913), Marks & Wollenberg, on the 8th day of July, 1891, filed their original petition in the Court of Claims, alleging that they were the owners of the property described in the petition, and that the property was taken or destroyed without just cause or provocation on the part of the owners or agents in charge

thereof, in June, 1878, in the then county of Grant, now Malheur County, Oreg., by the Bannock and Pi-Ute Indians, then in amity with the United States. The case is one of a series of cases advanced for hearing in the Supreme Court at the instance of the Government for the final settlement of questions which apply to and control a large number of other suits now pending in the Court of Claims. (The other two cases so advanced are those of *Benjamin H. Johnson* v. *The United States and the Utes* and *Alvin C. Leighton* v. *The United States and the Ogallala Sioux Nation of Indians.*)

It is reasonably safe to say that some four thousand other suits, involving perhaps not less than $20,000,000, now await the action of the court on the cases now presented for determination. Though these present separate and distinct propositions, they all have the same common origin, and the questions in them are so intimately blended in their relation to each other it is well for them to be taken and considered at one and the same time.

There are other cases now on the docket of the lower court where judgments were rendered *pro forma* under the election of the respective parties to the suits not to reopen certain awards of the Secretary of the Interior, whose final determination await the decisions here of the test questions here submitted, inasmuch as under the provisions of section 1088 of the Revised Statutes and under the special act of August 23, 1894 (Stat. L., 3d sess. 53d Cong., ch. 187, p. 869), motions for new trial were filed by the United States in a considerable number of the judgments so taken, the act of Congress directing the

reexamination of the said judgment cases being largely the result, no doubt, of the later decision of the Court of Claims in a case presenting the question that all the requirements of the act of March 3, 1891, necessary to be proved to entitle the claimants to recover are alike as necessary in one class of cases as in the other, referring to allowed cases as contradistinguished from those cases not allowed in the Interior Department before the court took the jurisdiction. It should not be taken for granted, however, that the decisions of the court in the case at bar, and the other two cases argued with it, will settle the controversy respecting the interpretation to be given to the act under consideration in all its parts. Other cases, involving citizenship, the status of certain tribes, the entity and suable capacity of certain bands or subtribes, provocation under the statute, the rights of certain Indians to notice, title in special cases, and right of recovery where the claimant at the time of the loss was unlawfully on the reservations, and cases where judgments have been or may be rendered on findings in the nature of special verdicts, the identity of the alleged offenders, questions of set-off, and other controverted matters will be presented in appeals already taken or noted in the due course of business.

The petition in this case alleges that the claim was presented for payment to the Commissioner of Indian Affairs July 27, 1888. There is no allegation that any action was ever taken on the claim in the Interior Department. Subsequent to the filing of the suit in the Court of Claims (November 14, 1893) the claimants moved for leave to amend their petition by inserting in paragraph 2 the fol-

lowing words: "That the Indians aforesaid were chargeable for said depredations and under an obligation to pay for the same by reason of the provisions of the treaty of July 3, 1868, between the United States and the Shoshone (Eastern Band) and Bannock tribe of Indians."

The Attorney-General filed a general traverse to the allegations of the petition and asked judgment that the same be dismissed.

The findings of fact upon the evidence were substantially as follows:

That the claimants possessed a ranch at the time and place alleged in the petition, on which they had cattle and horses, and that the Bannock and Pi-Ute Indians made a raid through the country and upon the ranch of the claimants, in which raid they destroyed property and killed some of the citizens. The Indians numbered between 500 and 600 and were in a body or band moving in concert, having the form of an Indian military organization. That the citizens of the county, in consequence of the raid, petitioned the military authorities for protection against the Indians. That the Indians killed and stole the cattle and horses of the claimants to the value of $5,454, no part of which was returned or paid for. That the claim for the property was presented to the Commissioner of Indian Affairs, but no final adjudication thereon was ever made. Various facts relating to the defendant Indians before, at, and subsequent to the raid were embodied in the findings of the court, showing the outbreak of the Bannocks and the progress of hostilities. The military operations which ensued are set forth in

detail. The ultimate fact was found, so far as it was a question of fact, that the tribes or bands of Pi-Ute and Bannock Indians were not in amity with the United States at the time the depredations complained of were committed.

At the request of the claimants additional findings were given embodying an opinion rendered in the Interior Department August 23, 1886, relating to the consideration and allowance of Indian depredation claims under the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885 (23 Stat. L., 376), and subsequent acts.

That in making adjudications of claims under said act of March 3, 1885, and subsequent acts, the Interior Department considered and decided upon their merits claims arising during the disturbances, as set forth in Findings II and V, among the Bannock Indians, and allowed sixty-one of such claims, and disallowed upon the facts eight of such claims, it not appearing that any of the claims were paid by the United States or Indians, or that Congress made any appropriation for the payment of the claims thus allowed. No case arising during the disturbances was disallowed by the Secretary, nor was jurisdiction refused or denied by him because of any defect in or want of treaty stipulations to render the Indians chargeable for their depredations or because the depredation was committed in time of tribal hostility. In making

allowances the Commissioner of Indian Affairs uniformly referred to section 1 of the treaty of July 3, 1868 (15 Stat. L., 673), as the treaty creating the obligation for payment; and the report to Congress by the Secretary of the Interior of such allowances, required by the act of March 3, 1885, referred to this treaty as creating the obligation for payment. That in considering claims for depredations under the act of March 3, 1885, and subsequent acts, the Secretary of the Interior and the Commissioner of Indian Affairs held that claims were authorized to be examined under said acts wherever a treaty appeared to be in force with the tribe charged with the depredation containing provisions the same as or substantially similar to those contained in section 1 of the treaty with the Bannock Indians of July 3, 1868. (15 Stat. L., 673.)

Allowances were reported to Congress by the Secretary in three hundred and fifty-five cases generally, under said acts, besides the sixty-one cases against the Bannock Indians referred to in Finding IX of the court. In ninety-seven other cases, likewise allowed, the treaties contained similar provisions, promising to preserve peace and to take definite action in case of depredations by Indians belonging to the tribe, but contained no provisions for payment for depredations out of annuity funds. In two hundred and three other cases, likewise allowed, the treaties contained provisions pledging the tribe to peace and amity or to refrain from depredations, but contained no provision for the course of action for the tribe if hostilities or depredations occurred, or for payment for depredations out of annuity funds. The total number of claims allowed and

reported to Congress under the act of March 3, 1885, and subsequent acts, as aforesaid, was nine hundred and fifteen.

Findings XI, XII, and XIII for the claimants disclose that no claims where such treaties appear, as set forth in the preceding findings, were disallowed or jurisdiction thereof refused or denied by the Secretary of the Interior under the act of March 3, 1885, and subsequent acts, because of any defect in or want of treaty stipulation to render the Indians chargeable for the depredation. That no discrimination was made by the Secretary of the Interior in examining and adjudicating claims under the act of March 3, 1885, and subsequent acts, between claims arising when the tribe charged with the depredation was in an actual state of peace and claims arising when the tribe was not in an actual state of peace. The annual reports to Congress by the Secretary of the Interior under the act of March 3, 1885, and subsequent acts, were printed in the regular series of executive documents and were on the files of both Houses of Congress. They contained references to the treaty in each case.

The additional findings given at the request of the defendants (XIV and XV) were to the effect that the claims allowed by the Secretary of the Interior were by him reported to Congress; but Congress refused to make such payments, and no claim allowed by the Secretary of the Interior in any case where the treaty was identical with or similar to the treaty with the Bannock Indians, or where the Indians committing the depredation were at the time at war with the United States, had ever been

paid. That Congress refused to pay depredation claims where the tribe charged was at war with the United States on the ground that "these losses were incident to a state of war with savage tribes." (House Report 932, 25th Congress, 2d session; House Report 1028, 25th Congress, 2d session.) Upon the findings of fact the court determined, as a conclusion of law, that the petition be dismissed, and the claimants thereupon appealed to the Supreme Court.

ARGUMENT FOR APPELLEES.

Inasmuch as this case, with the proceedings in the other two cases now advanced for argument, affect so many other cases, it will perhaps prove useful to offer to the court in behalf of the defense some general observations respecting the act under which the suits were brought, the origin of the cases, and the relation or want of relation of the treaties with respect to the matter of the liability of the Indians.

In many respects the act of March 3, 1891, is a remarkable statute. Upon certain conditions the United States have made themselves liable to the claimants; but so far as the Indians are concerned the United States have the semblance of being the plaintiffs. Indian liability is predicable, or is attempted to be made so, under rules and principles international in character, and liability generally must be reached under conditions in all cases that, to say the least, are somewhat extraordinary and peculiar.

Up to the time the United States discontinued the policy of treating with the Indian tribes as treaty-making

powers a great number of treaties were made and concluded with the nations, civilized and uncivilized. Since the discontinuance of this policy agreements in the nature of contracts have been the subject of convention between the Government and the tribes, although tribal rights have continued to be recognized, and Government policy has not been essentially different. Many of the treaties and agreements relate to the surrender of land on the part of the Indians and the payment by the United States of money in the form of annuities for the extinguishment of the Indian titles. Nearly all of the treaties cover "peace and friendship," the burial of the hatchet, the regulation of trade and intercourse, the delivery of goods, the payment of annuities, mutual confidence, and that state of feeling intended to maintain and preserve the public peace and the allotment of Indian tribes to reservations to insure the peace.

Even before the adoption of the Constitution, treaties for perpetual peace and friendship and protection were made. In the preamble to the ordinance of August 7, 1786, passed by Congress before the Constitution was adopted, we find references to Indian treaties (Am. State Papers, Indian Affairs, vol. 1, p. 14), in which it was acknowledged that "good correspondence" between our citizens and the several nations of Indians in amity with them was dependent upon the safety and tranquillity of the frontiers of the United States in some measure. There have been negotiated from time to time with some three or four hundred different tribes, subtribes, or bands of Indians about nine hundred treaties. Many of these

treaties, it might not be amiss to say, were forced upon the tribes, and in numerous instances the bands did not acknowledge their validity. The official list of all Indian treaties and agreements made with the several tribes of Indians and the United States which have been ratified and where the same appear in the Statutes at Large discloses a total of six hundred and sixty-six treaties, not including agreements made since 1871. It is a remarkable fact that of this great number of treaties only forty-four contain provision in any way, in express terms, for the payment, out of the annuities or otherwise, of claims arising from depredations; and even as to this number some of the treaties appear to have been made with the same band or nation of Indians.

In five of these forty-four treaties the United States agreed to pay for the depredations of the tribes, that of 1819 with the Osages being in consideration of the cession of Indian lands; while several of the remaining thirty-nine were probably superseded by other and later conventions. Some of these thirty-nine treaties merely provided for payment for stolen horses at $50 per head (Cherokee treaty of 1795), and at $60 per head (Cherokee, 1798) where the property was not returned within ninety days; some provided that where bad men should commit the wrong, the wrongdoer should be delivered up, on proof to the agent and notice to the tribe, to be tried and punished according to the laws of the United States, with reimbursement for loss only in case of willful refusal to deliver the offender. (Cheyenne and Arapahoe treaty of 1868, and also Northern Cheyennes and

Northern Arapahoes of the same year.) Some provided payment for injuries to the property of citizens peaceably passing through the country (Comanches and Wichitas, May 19, 1836), and to refrain from warlike incursions into the Mexican provinces, and to pay for injuries to our people lawfully residing in or passing through their territories. (Comanches, Kiowas, and Apaches of 1854.) Very few of the small number of treaties where there are agreements to pay for depredations are unattended with conditions, but, on the contrary, imposed conditions which were rarely complied with by persons having a depredation claim.

Without going into an examination in detail of the conditions under which liability was declared at all in the few treaties where payment for depredations was attempted to be provided for, it is enough to say here that the terms of liability vary and are embodied in agreements so ancient that there are and can be no claims on account of depredations now made under most of these. The existence of the very few treaties unconditionally promising on the part of the Indians to permit their annuities to be charged for the acts of bad men among the tribes proves these agreements immaterial so far as suitors can claim anything under the act of 1891 ; and to attempt to enforce these provisions against the Indians now involves bad faith on the part of the United States, since the wrongs done to the tribes by white men, also provided for in the same treaties, would be ignored. Nor will it be done unless to do so is clearly an exception to the scheme of the jurisdictional act whereby all claims, as we contend, for depre-

dations were referred to the court for determination upon certain principles that affect them all alike. The inequitable features of a statute that would permit equally meritorious claims to be adjudicated upon different principles, working out by such a rule results so discriminative, is sufficient to negative such a proposition. And the injustice of the conclusions contended for, that cases under this act are to be treated differently where a defense exists on account of the conduct of the Indians, points to the error of adopting such a construction of the law.

The act giving the citizen the right to use the process of the courts to obtain compensation for the depredations of Indians was the result of long-continued and persistent effort for almost a century. It came too late in our history, however, to be of any service to the people of most of the States. The descendants of Boone and Calloway in Kentucky and Missouri, and the descendants of those brave men who faced Tecumseh in Ohio and fiercely struggled with Pontiac along the lakes of the great Northwest in the early days, reaped the reward in the grand Commonwealths in which their sires planted the outposts of civilization without aid from the Government or contribution from the annuities bestowed upon the tribes whose lands were wrested from them and whose plea of wrong and injustice will soon be heard no more in the gradual extinction of the race known as the North American Indians. Even for those favored localities where depredations have occurred within the last thirty years the law came too late to be of material service to many with claims possessing more real merit than some

of those we now have to deal with. Claims originating before July 1, 1865, by the terms of the law can have no consideration unless they were filed with Congress or some Department of the Government, or with some one of the officers named in the act, within the proper time, while many of the losses sustained at the hands of depredating Indians having their origin since that time are not within the conditions which may authorize the court to render judgment at all. Hence many well-founded losses have no forum for their adjudication, and can not now be the subject of consideration anywhere.

When the act of 1891 was approved an erroneous impression seems to have prevailed in regard to the scope and effect of the law. Ten thousand eight hundred and forty-one cases, with claims for damages in a sum approximating $44,000,000, sought the jurisdiction of the court, covering many claims which were never in contemplation of payment at all. Some of these cases were brought for losses of aliens who happened to be upon American soil, and some for citizens who had taken the risks of trade and commerce and the perils involved in land seeking and mining on our borders where the Indians were numerous and hostile and known to be so, and by persons who conceived the idea that the court was authorized to award judgment in all instances where a loss was susceptible of proof, whether the depredating Indians were at war with the United States or not, and disregardful of the fact that the claimants themselves were out at the time hunting down and slaughtering Indians wherever they could be found, and appropriating their lands and stock

as well. Again, it seems to have been thought by some that a claim on file with the Interior Department at the time of the passage of the act of March 3, 1891, had exceptional advantages over those claims not filed at that time, and that the amity of the Indians provided for in the law had no meaning for any claims except those which had never been filed. Misapprehension of the kind and character of the claims that Congress really intended to pay is no doubt responsible for the large number of suits brought, but the debates on the floor of Congress preceding the passage of the act did not indicate, either from the opponents or the friends of the measure, that such a great number of persons claiming amounts so large as events subsequently proved would come forward with demands so extraordinary. It is interesting in this connection, as it is also instructive in the interpretation to be given to the law, to note the fact that it was stated by some of those urging the passage of the law that in no event would the Treasury be called upon to answer damages for claims exceeding five or six millions of dollars if the bill providing for payment should become a law.

From early times there have been Congressional enactments for the ultimate indemnification by the United States of persons sustaining losses at the hands of depredating Indians, but no act of Congress at any time provided for eventual indemnification of persons, whether aliens or citizens, except upon the condition that the Indians were in amity with the United States at the time of the losses. Even as to those cases of spoliation where the Indians were clearly at peace it is well to bear in mind that for practically all the cases now claiming relief this

law is not necessarily the result of the promises of previous legislation for ultimate payment. Section 8 of the act of February 28, 1859 (11 Stat. L., 401), repealed the Government promise for indemnification in express terms; and while it is true that the United States, in withdrawing (thirty-six years ago) the Government promise to pay, left upon the statute book the obligation of the tribes to make the indemnification out of their annuities, nevertheless the act of 1834 prescribing tribal liability upon conditions was never changed until its bar had attached to nearly every claim against annuity-receiving tribes, and very few white men having claims against the Indians on account of depredations ever put themselves to the trouble of making application to the proper superintendent or agent for reimbursement in accordance with the act of 1834, when the loss, if any, was susceptible of proof, for the purpose of charging the annuities. So that if the act of 1834 was the basis of Indian liability most claimants are themselves responsible for that condition of affairs which fairly precludes them from claiming a Government promise that the Indians should pay.

The case at bar is one of the kind in which, notwithstanding a treaty, the claimant did not see fit to apply for reimbursement in the mode and manner pointed out by law, and at a time when, if the annuities were chargeable at all, the claim should have been presented, in compliance with the terms fixing Indian liability. The law of 1891 ought, therefore, to be viewed with that circumspection and strictness which the circumstances and conditions precedent for ascertaining and fixing Indian

liability warrant, so that every claim shall be determined without resort to treaty provisions, with those of the tribes who made treaties, for more than such treaties are *prima facie* worth on the controlling feature of amity. This suggestion is presented to the court because of the contention that it is inferable from the act of 1891 that jurisdiction is conferred to render judgment in claims based on treaties merely and on allowances of the Interior Department independent of the amity of the parties charged.

The act as it stands is most unequal and partial in that it is not reciprocal in its operations. For the taking and destruction of property of Indians by white men no relief is granted to the tribes or to individual Indians, in consequence of which the promises of the early legislation recognizing the claims of Indians for the depredations of white men are completely ignored. In the contention over the matter of the proof of such losses by Indian testimony the entire subject of the payment of Indians under the protection of treaties with us for the depredations of white men was dropped, and the rights of the tribes were not recognized in the measure that finally received the sanction of Congress.

The suggestions made respecting the partial and unequal character of the act of 1891 are not intended to carry any sentimental considerations for the determination of the case, but are presented to meet that line of argument which insists in certain cases that Indian treaties fix Indian liability for the losses of white men, no matter how hostile white men at the time were to the tribes charged.

In view of the effort in this case to charge the annuities of the Bannocks and the Treasury of the Government for the acts of that tribe, the first material inquiry with which we may properly deal is: What is an Indian depredation? And in what sense is the term used in the act of 1891, for which the annuities of the Indians shall be charged, and for which, if the Indians have no annuities, the United States shall pay?

That depredations relate to the taking or destruction of property exclusively and not to claims for damages to the person we know from the language of the act. But how and under what circumstances? And what did Congress intend to have adjudicated when it provided for this new jurisdiction of the Court of Claims in passing on the unlawful acts of Indians?

That Congress did not mean to do in the enactment of 1891 what it had refused to do in all the previous history of the Government seems reasonable, and yet in the more than century of its existence Congress did refuse to provide for the adjudication and payment of claims incident to wars with savage tribes.

And that Congress did not intend to provide for claims beyond the scope of the early acts on the subject seems also reasonable in view of the fact that the law of 1891 was passed with full knowledge that Indian depredations related merely to trespasses in time of peace, not to acts which in a state of war the tribes had a right to commit.

Property may be the subject of open and covert taking and destruction in time of war as well as in time of peace, but the criterion by which the depredations provided for

by Congress in 1891 must be judged is the construction given to all Indian depredation acts. This interpretation is to be found in the fourteenth section of the act of May 19, 1796 (1 Stat. L., 472), and the seventeenth section of the trade and intercourse laws of 1834, and the joint resolution of June 25, 1860. From these statutes Congress in effect construed an Indian depredation to be the taking or destruction of property by Indians—to mean "Indians trespassing on white men." (*Leighton* v. *The United States*, 29 C. Cls. R., p. 288.)

The depredations for which the Indians must pay if they have annuities, and which the Government must satisfy from its Treasury if the identified Indians have not annuities, are criminal acts or acts *quasi* criminal in their nature, and which are only criminal because the said acts were committed in time of peace, and not acts which open the jurisdiction of the court to citizens of the United States for occurrences happening at a time when our citizens were burning Indian villages, taking Indian property, appropriating Indian land, and slaughtering Indian tribes. The depredations meant are simply the acts of bad men, marauders, and robbers among the Indian tribes living as tribes in peace with the United States at the time of their commission. Congress knew that no such thing could successfully be carried out as to provide for the adjudication and payment of claims incident to a state of war, not only because of the general injustice of the proposition in declaring that our Government was free from all blame in beginning the war, but also because of the manifold abuses that would necessarily

creep into the work if indemnifications of this kind should be imposed upon those who created the war (and upon its own Treasury in default of those responsible for the damage). Congress must also have known that it would have taken more than $5,000,000 or $6,000,000 to pay for all the houses burned, cattle and horses stolen, crops destroyed, and property generally appropriated if claims arising in our Indian wars were to be the subject of adjudication; and it is fair to assume that, on the assurances from the friends of the measure that the entire amount necessary to discharge these claims would not exceed that sum of money, the law was the result of an understanding that the depredations for which payment was to be made were depredations occurring in time of peace with individual members of the particular tribe charged and not by fighting tribes.

An interesting attempt has recently been made in an official publication to show the aggregate amount of Government expenditures on account of Indians residing within our borders from the foundation of the Government to the present time. The result indicates expenditures exceeding $1,000,000,000. The prime factors entering into the expenditure of this vast sum of money include the expenses of the wars waged with the tribes and the maintenance of our standing army in the vicinity of the reservations; and likewise the claims of the States for indemnity for expenses incurred in repelling Indian invasions. A third item covers the civil and educational expenses on account of Indians, while a fourth charge is the cost of pensions to the survivors or widows of soldiers serving in Indian wars. It is a remarkable fact that,

except when engaged in wars with Great Britain and Mexico and in the war between the States, the United States Army has been used almost exclusively in the Indian service, and has been stationed largely along the frontiers where the Indians were most hostile. Census experts disclose that more than $10,000,000 have been used to reimburse particular States for expenses incurred by them in Indian wars, and $28,201,632 have been expended for pensions to survivors or widows of Indian wars. The Indian wars under the Government are stated to have numbered more than forty, and to have cost the lives of 19,000 whites and 30,000 Indians. Since 1828 it has been the policy of the United States to refund to the States and Territories the moneys paid out by them in suppressing Indian hostilities. This liability is based on the fact that the Federal Government has treated the Indians either as nations or as wards of the nation, with the rights of belligerents. (See Indian Census Report, 1895.) It is therefore not reasonable to assume that Congress contemplated such a thing as the payment of any citizen for the acts of hostile tribes.

THE ISSUES.

It is contended on behalf of the claimants :

(1) That the words "in amity" in the law under which the suit was brought, mean "in treaty relations," and that the condition of Indian hostilities does not affect the petitioners' right to recover.

(2) That the existence of war, if material, is to be ascertained only from the authoritative act of the legislative or executive department.

(3) That the statute grants jurisdiction for losses chargeable by reason of treaty stipulations without regard to the existence of "amity," whatever be the meaning of that word.

(4) That in considering Indian depredation claims under the act of March 3, 1885, and subsequent acts, the Secretary of the Interior and the Indian Office held that claims were authorized to be examined under said acts wherever a treaty appeared with the tribe charged with the depredation containing provisions substantially similar to those contained in section 1 of the treaty with the Bannock Indians of July 3, 1868, and that the court is bound by the Department construction.

(5) That the claim is one of those "authorized to be examined and allowed by the Interior Department" and therefore not controlled by the condition of amity; that there are jurisdictional classes of claims, each independent of the other; and the claim in the case at bar being one of those authorized to be examined and allowed at a time when the Interior Department had the control, the jurisdiction of the court acquired on the transfer of the cases is independent of any qualifications or conditions upon jurisdiction under the first paragraph of the act of March 3, 1891.

The defendants maintain—

(1) That the words "in amity" should be considered as equivalent to a state of peace as contradistinguished from hostilities or a state of war.

(2) That the existence of hostilities or a state of war between the United States and their codefendants is to be determined by the proofs in the case.

(3) That the statute does not grant jurisdiction for losses chargeable by reason of treaty stipulations disregardful of the condition of the amity of the Indians with the United States at the time of the depredation.

(4) That in considering Indian depredation claims under the act of March 3, 1885, and subsequent acts, the action of the Secretary of the Interior and the Indian Office was merely advisory to Congress; and that the action of the Secretary in holding treaty relations to be the equivalent of amity relations was not in compliance with law; and the court is not bound by the action of the Secretary or that of the Indian Office in their construction of the statutes governing the investigation of claims under the acts of 1885 and subsequent acts preceding the act of March 3, 1891.

(5) That the claim is not one of those "authorized to be examined and allowed by the Interior Department" under the act of March 3, 1885, and acts subsequent thereto.

(6) That there are no jurisdictional classes of claims under the act of March 3, 1891, which establishes one rule of adjudication for claims designated in the first part of section 1 and another and a different rule for other claims designated in the succeeding paragraphs where defenses are interposed upon proper pleading.

The claim of the firm trading as Marks & Wollenberg was one of those cases transferred from the Interior Department to the jurisdiction of the Court of Claims by the thirteenth section of the act of March 3, 1891, the claim having been presented to the Indian Office in 1888.

No consideration was ever given to it, and consequently it was never allowed by the Secretary of the Interior. It was simply filed for him to consider and allow if entitled to an allowance. On the first hearing of this cause in the court below the argument turned upon the meaning and import of the amity of the depredating tribes of Indians at the time of the alleged taking and destruction of the claimants' property, and as to what Congress really meant by the use of that term in the statute prescribed as one of the conditions necessary to exist to entitle the claimants to recover from the Indians and the United States. On the second and final hearing of the cause on the motion for new trial (in November, 1893) other and different considerations were advanced for purposes of recovery, the contention finally ending with the proposition of claimants that the case was one which came within the jurisdiction of the court, not under the first class of claims named in the statute, but under paragraph 2 of the second class of said claims. This latter contention was a practical abandonment of the positions first taken by the claimants and their learned counsel, and involved the proposition that a state of war with the defendant Indians was not meant by the lawgivers to affect or cover claims for depredations filed under the act of 1885 and subsequent acts as claims authorized to be examined by the Secretary of the Interior, and that the jurisdiction conferred on the court to adjudicate all these claims for payment was so divided and split up that the court under the imperative command of the statute might hold the want of amity to be a defense to some cases for Indian depredations, but

not a defense to others having only the advantage of being on file in the Interior Department against a tribe in treaty relations with the United States when the act of March 3, 1891, was first approved. Connected with this line of argument was the further proposition that the United States had a treaty with the Bannock Indians, and that this treaty created an obligation for payment in cases like that at bar, and that if treaty obligations existed the court was to take jurisdiction of the claim even if amity was not established and the claim had not been allowed by the Secretary of the Interior.

THE STATUTES.

The first legislative step ever taken by the Government for the indemnification of persons sustaining losses at the hands of depredating Indians was the act of May 19, 1796, section 14 (1 Stat. L., 472); the next act was that of March 3, 1799, section 14 (1 Stat. L., 747); the third, that of March 30, 1802, section 14 (2 Stat. L., 143); and the fourth act was that of June 30, 1834, section 17 (4 Stat. L., 731), this last act being what is known as the trade and intercourse laws with the Indian tribes. Copies of these various acts of Congress are subjoined in the appendix to this brief and are marked A, B, C, and D. The seventeenth section of the act of June 30, 1834, was reenacted in the Revised Statutes as section 2156. The next act on the subject was that of February 28, 1859, section 8 (11 Stat. L., 401). (See Appendix E.) The joint resolution of June 25, 1860 (12 Stat L., 120), is hereinafter set forth as Appendix F. The act of July 15, 1870,

section 4 (16 Stat. L., 360), now appears as section 2098 of the Revised Statutes. (See Appendix G.) The act of May 29, 1872, section 7 (17 Stat. L., 190), was carried forward into the Revised Statutes as sections 445 and 466. (Appendix H.) Section 2156 of the Revised Statutes is hereinafter set forth as Appendix I. The act of March 3, 1885 (23 Stat L., 376), and the subsequent acts of May 15, 1886 (24 Stat. L., 44), and March 2, 1887, chapter 320 (24 Stat. L., 464), and June 29, 1888, chapter 503 (25 Stat. L., 234), and March 2, 1889, chapter 412 (25 Stat. L., 998), and August 19, 1890, chapter 807 (26 Stat. L., 356), were acts embraced within appropriation acts of Congress. These various acts, in their material parts, are hereinafter set forth as appendixes J, K, L, M, N, and O.

The act of May 29, 1872, section 7 (17 Stat. L., 190), reenacted as sections 445 and 466, Revised Statutes, made it the duty of the Secretary of the Interior to prescribe rules for the presentation of claims "arising under existing laws or treaty stipulations for compensation for depredations committed by Indians, but did not enlarge the class of claims which the Secretary was authorized to consider under the above-cited act of 1834 (or Revised Statutes, section 2156), which limited his jurisdiction to claims against tribes "in amity." The jurisdiction under this act, therefore, extended to claims against both treaty and nontreaty Indians. The Secretary was to investigate all claims presented and to report to Congress the nature, character, and amount of said claims, whether allowed by him or not, *and the evidence upon which his action was based.*

The act of 1885 directed the Secretary of the Interior to cause a list to be prepared of all claims of citizens of the United States approved by him in whole or in part, and also all claims pending, but not at the time examined, chargeable against any tribe of Indians *by reason of any treaty*. This was a limitation of the jurisdiction conferred by the act of 1872, *since it was confined to claims of citizens against Indians in treaty relations*. The Secretary of the Interior was required to report to Congress under the terms of this act also, and his report was to include, among other things, the date and clause of the treaty creating the obligation and the *name, address, and testimony of the various witnesses*.

The requirement of the act of 1872 for a *statement of the evidence upon which the Secretary's action was based*, and the requirement of the act of 1885 that the Secretary should furnish in his report to Congress the *name, address, and testimony of the various witnesses*, clearly indicated an intention to provide a defense to such claims. The name, address, and testimony of the various witnesses could not have been important if the findings of the Secretary were not to be subjected to Congressional scrutiny and investigation. The evidence upon which the Secretary's action was based could not have been of any interest unless it was to be subject to correction or impeachment or to some test that Congress might provide for the sufficiency of the report in each case.

The claims which had been allowed by the Secretary in whole or in part would not have been joined with claims which were pending or not allowed if it had not been

that all the claims alike were to be subject to a thorough investigation.

Such claims as had been allowed in whole or in part would not have been confided to the jurisdiction of the Court of Claims for the mere perfunctory process of rendering judgment, since they were so closely connected with claims that had not been allowed and in which the court could not render judgment without the formalities that attend other suits.

It will be seen that the statutes provided for the payment of claims on account of the depredations of Indians *in amity* with the United States, and that no statute ever changed the conditions for payment. Those statutes directing the Secretary of the Interior to investigate claims, therefore, made the report of the Secretary advisory to Congress and not conclusive, and in such shape that further investigations should be had if deemed proper.

CONSTRUCTION OF THE STATUTES WITH REFERENCE TO THE REMEDIES OFFERED FOR ALL CLASSES OF CLAIMS.

It has been urged that in the construction of the act under which the suit in the case at bar was brought the courts should take the most favorable view for the claimants in giving the remedy, inasmuch as the act is a remedial statute and that the remedy should be granted upon principles of the most liberal construction. These suggestions do not address themselves to me as the true rule. The suit is against tribes upon whom no notice has ever been served. The service of the petition must be

made upon the Attorney-General only, whose duty it is to appear and defend the interests of the Indians as well as the Government. The annuities of the Indians are sought to be charged under extraordinary circumstances. The tribes have no direct representative in court, and their defense must be made by a law officer of the Government without those means usually employed by persons directly interested in the defense of suits affecting their rights, and long after the occurrences actually happened, with all the disadvantages resulting from the lapse of time, such as the death of witnesses and the want of knowledge of who the living witnesses are.

In addition to these special reasons there is the rule of law that in suits against the State statutes are to be strictly construed. The doctrine of strict construction is applicable to the law under consideration because the jurisdiction created by the statute imposes new duties and new causes of action special in degree and character and out of the course of the common jurisdiction of the court. The claims are all founded on tort, and except as to a few of them none of the elements of contract appear. The statutory remedy, therefore, must be strictly pursued. When a statute creates a right and provides a specific mode for redress of injuries or gives a right of action for an injury not previously actionable by the plaintiff, it must be strictly followed. (Endlich on the Interpretation of Statutes, section 168, p. 233.) In a case in Texas it was held in the line of this authority that the right to sue the State is a matter of favor conferred in derogation of that immunity which every sovereign enjoys, and that

statutes conferring such privileges should be construed with strictness (24 Tex., 504). Reasons might be multiplied for this rule with respect to the Indian depredation law, but it is sufficient to add that where Congress was enough dissatisfied with the procedure to oust the jurisdiction of one of the departments of the Government and confer the right to examine and adjudicate upon one of its courts, the privileges granted should be construed with that degree of strictness that Congress evidently contemplated.

The technical and restricted meaning of some of the words of the act being insisted upon by the claimants, as against the plain and ordinary import of the words contended for by the defense, and the independent and different character of the jurisdictions acquired by the court being urged with much earnestness by the petitioners, it is proper at this point to recur to some of those canons of construction applicable wherever there is a contention about the meaning of terms employed in a statute as to what was really intended by Congress in sending claims for the depredations of Indians to the court for adjudication.

The Supreme Court of the United States, in the construction of an amendment to a railroad charter, said:

> Vattel's first general maxim of interpretation is that "It is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusions—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to

restrict or extend it, is but to elude it." (Vattel's Law of Nations, 244.) Here the words are plain and interpret themselves. (*Ruggles* v. *Illinois*, 108 U. S., 534.)

In *Rhode Island* v. *Massachusetts* (12 Pet., 721), where the question was whether a controversy between two States over the boundary between them was within the grant of judicial power, the court said: "The solution of this question must necessarily depend on the words of the Constitution and the meaning and intent of the convention which framed and proposed to leave adoption and ratification to the convention of the people of and in the several States; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the Constitution."

And that words should be taken in their obvious sense and to have a reasonable construction Mr. Chief Justice Marshall in *Gibbon* v. *Ogden* (9 Wheat., 188) said: "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they said."

In the case of *Maillard* v. *Lawrence* (16 How., 251) the court said: "The popular and received import of words furnishes the general rule for the interpretation of public laws." In *Jaeger* v. *The United States and Yuma Indians* the following language is used: "Statutes are to be read on the lines, and not between the lines, to be properly interpreted." (27 C. Cls. R., 278.)

In *Newell* v. *The People* (7 New York, 97) the court said: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is *the thought* which it expresses. The first resort in all cases is the natural signification of the words. If the words embody a definite meaning, involve no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the only one which we are at liberty to say was intended to be conveyed. In such cases there is no room for construction." In *McCluskey* v. *Cromwell* (11 New York, 601) the court said: "In the construction of contracts and statutes the intent of the framers and parties is to be sought, first of all, in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation."

The correct rule of interpretation is, that if divers statutes relate to the same thing they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts *in pari materia* are to be taken together as if they were one law. (Doug., 30; 2 Term Rep., 387, 586; 4 M. & Selw., 210.) If a thing contained in a subsequent statute be within the reason of a former statute it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute this will amount to a legislative declara-

tion of its meaning and will govern the construction of the first statute. (*Morris* v. *Mellin*, 6 Barn. & Cress., 454; 7 Barn. & Cress., 99.) Wherever any words of a statute are doubtful or obscure the intention of the legislature is to be resorted to in order to find the meaning of the words.

It is a well-established principle that every part of the statute is to be considered, and the intention of the legislature to be extracted from the whole, etc. In 2 Pet., 662, it is said: "A legislative act is to be interpreted according to the intention of the legislature apparent upon its face."

In doubtful cases a court should compare all the parts of a statute and different statutes *in pari materia* to ascertain the intention of the legislature. (*United States* v. *Freeman*, 3 How. U. S., 553.)

"The interpretation * * * is often to be sought from the surrounding circumstances and preceding history." (*Siemens* v. *Sellers*, 123 U. S., 276.)

"In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section, the statutes or series of statutes *in pari materia*." (*Atkins* v. *The Disintegrating Company*, 18 Wall., 301; *Patterson* v. *Winn.*, 11 Wheaton, 389; *Dubois* v. *McLean*, 4 McLean, 489; 1 Cooley's Blackstone, 59; *Doe* v. *Brandling*, 7 Barnewall & Cresswell, 643; *Stowel* v. *Zouch*, 1 Plowden, 365.)

In construing the jurisdictional act of 1891 it is well to bear in mind that the agreement of the tribes to pay is not the consideration for the act and that there are divers statutes relating to the same thing embodied in the act now under consideration.

JURISDICTION THE SAME IN ALL CLASSES OF CASES.

It is urged that Congress conferred separate and distinct jurisdictions on the court for the adjudication of the different cases according to classes. The object is to show that the test of jurisdiction in claims of the first class, which is the amity of the tribes at the time of the depredation, is not the test applicable to claims against the Indians in treaty relations; and that the second subdivision of the law must in effect be so construed as to be a proviso to the first subdivision without its limitations.

In construing this law with reference to jurisdiction we must look to—

(1) The form and construction of the act.

(2) Its legislative history.

(3) The reasons for maintaining the jurisdiction to be the same in all classes of cases.

(1) The paragraph relating to the jurisdiction of the court is as follows:

> *Be it enacted, etc.*, That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:
>
> First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.
>
> Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the

> Interior Department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided.
>
> Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

It will be seen that the act of 1891 refers to statutes enacted at different dates relating to the same subject, and that the jurisdiction of the court is inaugurated by language which shows that the court must adjudicate, in the manner provided, "*all* claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States." The form of the act expressly provides for the machinery of a trial in all cases. In the cases allowed by the Secretary of the Interior there is a presumption that the finding of the Secretary was correct. But as to these, provision is made for a trial at the option of either party. Undoubtedly, for cases not examined by the Secretary and for cases brought to the attention of the court by petition and not transferred from the Interior Department, the provisions for trial would seem to be precisely the same. Now, all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, hence called statutes *in pari materia*, are con-

strued together as though they constituted one act. (Sedgwick, 209; Ib., p. 368, secs. 283, 284.)

In looking to the form and construction of the act it will be observed that *all* claims * * * shall be presented to the court by petition; that *all* claims shall set forth the facts, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions. *All* claims shall be verified exactly alike and judgment asked upon the facts and the law. Unpaid claims examined and allowed in the Interior Department shall have priority of consideration subject to the election of either side to reopen the case and try the same before the court, the party electing to reopen assuming the burden of proof. The rules provided for in section 5 relating to testimony shall be the same in all claims. The determination of the court in each case on the value of the property taken and the tribe or other persons by whom the wrong was committed shall be the same for all claims. Wherever a judgment is rendered the annuities are chargeable in the same manner for all claims; and if no annuities are due or available, then payment is to be made for all claims exactly alike. Sales, transfers, or assignments of all claims are void. The same rights of appeal are given for all classes of cases, and the investigation of cases in the Interior Department ceased pending the transfer of such claims as were there at the time of the passage of the act of 1891. The scheme of the entire law seems to have been to invest the

Court of Claims with a jurisdiction which harmonized all classes of cases, imposing upon all like conditions and restrictions. There is nothing in the language of the statute, taken all together, disclosing an intent to confer on the court separate and distinct jurisdictions, but rather the reverse of such purpose. The second subdivision declares that "*such* jurisdiction shall also extend to all cases, etc." What else can be meant by the extension of *such* jurisdiction unless the court shall adjudicate "*all* claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation *in amity*"?

The Interior Department had examined and allowed claims under the act of 1872 (sections 445 and 446) as well as under the act of 1885 and subsequent acts. Some of these were allowed with reference to treaty relations and some without. The act of 1885 had no relation to the claims of aliens, while the act of 1872 had. The word "extend" shows that the jurisdiction conferred was extended so as to include the claims embraced in the second subdivision, to the end that the court might adjudicate in conformity with the act of 1885. In *Leighton's Case* (29 C. Cls. R., 288) the court thought that the word "extend" was used as synonymous with the word "include." Some of the judges held that there were no differences as to jurisdiction for the classes of claims, while the minority of the court thought that although there was an independent jurisdiction, nevertheless, in consequence of the command of the act of 1885, the facts of amity and citizenship were as essential in one class of

cases as in the other. The entire court was of opinion, however, that where war and not amity was the international condition at the time of the depredation the taking or destruction of the property by the tribes was the exercise of a belligerent right, and the loss, like the losses of other citizens in other wars, must be borne by the party on whom the loss fell, unless the Indian defendants assumed liability for war indemnities by treaty or liability was imposed as a condition of peace.

The allegations of the claimants' petition are inconsistent with the argument that there are different gateways to the jurisdiction of the court, and that amity or the want of that condition is immaterial in claims examined and allowed and authorized to be examined and allowed by the Secretary of the Interior under treaty obligation. If the amity of the offending tribes be not the sole test of the jurisdiction of the court, then why should the petitioners allege that the Bannocks were in a state of amity at the time of the taking and destruction of the property? An examination of the series of cases now before this court will show the same construction given by all the appellants to the statute on the jurisdictional question of amity and its application to all classes of the claims. I trust I may be pardoned for referring to the fact outside of this case, but nevertheless a record fact in the lower court quite pertinent to it, that 10,840 other claimants under the same law have construed the statute to mean that amity was an essential fact to be stated in their petitions while invoking the jurisdiction of the court for relief just as the claimants have done here.

It is urged on the part of the claimants that the construction of the statute contended for by them is supported by the use of the word "classes" in the act. That this does not follow is clear on two grounds: First, the word "classes" is a survival from the committee stage of the measure, when it included, under the second heading, all claims by Indians against white men; secondly, even without this clause, which was first stricken out by the Senate, the act as it now stands provides for two classes of claims, if we assume that those named in the second clause are really included in the first and are only specified through an abundance of caution; the other "class" being numbered 3, "all just offsets and counterclaims." Whatever may be the meaning of the second clause of the act (and it is the belief of counsel for the defense that it was understood by Congress to be merely a guard against the possible exclusion by implication of claims which had been already considered), the claimants' theory of construction can not be strengthened by the reference to "classes" of claims.

(2) The legislative history of the bill culminating in the act under consideration does not prove the proposition that it was the purpose of Congress to create separate and independent jurisdictions for the adjudication of these claims.

When the bill was introduced into the House the second paragraph provided for the adjudication of claims for peaceable Indians under the protection of any treaty with the United States. The first clause of the act provided for the adjudication of claims for property of citizens

against Indians in general, without reference to the peaceable or hostile condition of the Indians or treaties either. When this bill went to the Senate the second jurisdictional clause provided by the House bill, for the benefit of the Indians, was stricken out, and the first paragraph was amended so that the claims of citizens of the United States for property taken or destroyed by Indians in amity was substituted. The bill passed in this form in the Senate, with numerous other changes in other sections of the bill, and thereupon the entire matter went to a conference committee. This was in the closing hours of the Fifty-first Congress. The conference committee speedily reported the Senate bill very much as the same passed that body, inserting, however, the second subdivision to be found in the law as it now stands. Congress was about to adjourn, the bill was before the conference committee just as it passed the Senate, and it is natural to suppose that the second subdivision in the jurisdictional clause was the result of the committee's care not to see excluded from the jurisdiction of the court such of the claims as had gone to an allowance in the Interior Department and such of the claims as the Secretary was authorized to consider, without some recognition of the partial but incomplete progress the claims had made.

It could not possibly have been intended by the conference committee or by either body of Congress to enlarge the jurisdiction of the court upon different principles for the hearing of claims where some few were sustained by treaty and many more were not. The committee knew, and Congress also knew, that these cases depended

upon the same kind of proof, and came from the same sections of country, and had the same common source, and could only be correctly adjudicated and paid upon the same common principles, independent of treaties. The controversy between the Senate and the House related to the question of amity or the want of amity. The provision of the House bill was unlimited on this point, while the provision of the Senate bill was limited. When the conference committee got together it was evidently deemed fair and proper to notice in some way the claims that had been referred to the Secretary of the Interior for examination, for his allowances were to be treated as *prima facie* valid allowances, but not conclusive, and the court was to proceed with the examination of all the cases which the Secretary had not allowed but was authorized to examine and allow under the treaties, but subject to the amity of the band, tribe, or nation with the United States. The tribunal was changed, but the rights recognized by the Department were to continue to be recognized by the body that acquired the jurisdiction, subject to all defenses of law and fact. If this was not the construction meant by Congress, then the second subdivision negatives the first subdivision, conferring jurisdiction, in this, that by the second subdivision the court was required to attempt to determine claims for property under treaties only. Congress could not have intended by the two paragraphs to be in this manner so inconsistent with itself.

It has been said that treaty claims were included for adjudication upon the basis of treaty only, because nearly all Indian treaties contained provisions making the Indians

liable for depredations. This statement is misleading, because, as I have shown elsewhere, there are comparatively few treaties that contain provisions making Indians liable. And wherever by treaty the Indians appear to be liable the conditions for making them so were seldom complied with by white men sustaining losses in the first instance. And for want of treaty compliance the Secretary of the Interior really had no jurisdiction to investigate and allow in many of the applications before him.

The contention that claims had been the subject of repeated administrative action and that Congress accepted the decision of the Secretary as final upon the question of his jurisdiction is without foundation. If the jurisdiction was settled by the allowance of a claim, what possible reason could there have been for sending the cases which the Secretary of the Interior had passed upon to the Court of Claims for such adjudication as that court should, upon investigation, give to the claim? That Congress did not accept as final the decision of the Secretary upon the question of his jurisdiction is clear from the fact that a trial was provided for in an allowed case exactly in the same manner as in any other case where either the claimant, the Indian defendants, or the United States elected to have a trial. The allowances of the Interior Department were to be the subject of investigation by the court, as the *disallowances* of the Secretary and as all new cases were to be. If the allowances were final in the Interior Department, then Congress would not have sent them to a court for further investigation.

(3) The reasons for maintaining the jurisdiction to be the same in all classes of cases.

What object did Congress have in view in creating separate tests of jurisdiction on claims having the same common origin? No satisfactory answer has ever yet been made to this proposition.

And why did Congress, with knowledge that about $15,000,000 worth of claims were then pending in the Interior Department, attempt to pass a statute discriminative against those people with claims of equal merit, but who had not availed themselves of the privilege of asking an investigation at the hands of the Secretary of the Interior under the act of 1885 and subsequent acts? For all practical purposes the act of 1885 and subsequent acts were incorporated in the remedial act of 1891, and this was done for the purpose of giving such claimants a standing in the court for the adjudication of their claims under the act of 1891, and not under the previous statutes.

If the contention of the claimants be true, then we have in the first class amity claims, in the second class allowed claims, and in the third class treaty claims. There would be no reason for "amity" claims and "treaty" claims too, for this would be discriminative without adequate cause, arbitrary, and unjust. Nor would there be any substantial reason for providing for the contingency of defenses to "allowed" claims in the proviso that either party to the suit might elect to reopen if dissatisfied with the allowance of the Secretary of the Interior.

And if the contention of the claimants be true, then the construction given the jurisdiction of the court would be duplicated for some of the claims, because a case might belong to two or three of the classes named, and thus pos-

sess more than one of the requisite conditions to jurisdiction. This was never intended.

Again, the second subdivision does not confer jurisdiction on the court, in terms, to inquire into and finally adjudicate claims for property of *citizens* of the United States taken or destroyed by Indians, while the first subdivision does do so. It can not be imputed to Congress to say that some claims should be adjudicated for property of citizens, while other claims should be adjudicated for property of aliens merely because there were some treaties. But the Secretary of the Interior made numerous allowances for aliens, even under the act of 1885, which Congress must have known. The language of the first subdivision was made broad, and clearly defined the intention of Congress to provide for the adjudication of "*all* claims for property of citizens of the United States taken or destroyed by Indians," provided such Indians belonged to any "band, tribe, or nation in amity with the United States."

The words in the jurisdictional clause of the law, "all claims of the following classes, namely," were used because there were some claims which had been allowed by the Secretary and reported to Congress, and there were pending claims which he was authorized to examine by the act of 1885, while there were other claims which he was not authorized to examine. The words "either of the preceding classes," in the third subdivision, were intended to give the United States the right to set up counterclaims and offsets to all such claims, notwithstanding some may have been allowed and priority was

given thereto under section 4. The whole act, considering the object in view, must be construed together. (*Leighton* v. *The United States*, 29 C. Cls. R., 288.)

If the court below takes jurisdiction of claims by reason of their allowance only, then it opens the way for the contention that a claimant might recover though his claim arose during actual hostilities. This argument of claimants would dispense with the amity of the tribe, which was jurisdictional before the Interior Department, and the effect would be that amity would not be jurisdictional in the court. Congress never meant to be so unjust to those claimants who did not have the advantage of an allowance, but whose losses were equally pronounced as those who did get the benefit of an allowance, as to impose conditions not clearly and unmistakably applicable to both of the classes.

An examination shows that the act of 1885 and the subsequent appropriation acts authorizing the Secretary of the Interior to investigate nowhere substituted treaty for amity. The Secretary never had authority to enter into the investigation of the case where the treaty had lost its force, or had been superseded by another treaty, or had become dissolved by actual hostilities.

It has been said in argument, and two of the judges in the court below concurred in this view, that independent jurisdictions were intended because the Senate struck out many of the provisions of the House bill and reduced it to little more than the first jurisdictional clause; that the bill then went to the conference committee, and that the House having framed the thirteenth section, it naturally

followed that the new policy separating and extending the jurisdiction for the different classes was made complete by the addition of section 13 to the present law. This argument will not hold good, because, when the House bill first went to the Senate providing for the hearing of claims by Indians under the protection of treaty with the United States, the Select Committee on Indian Depredations in the Senate moved to strike out all after the enacting clause of the bill and insert the new matter, which was done. That new matter contained a direction in section 16 for the examinations in the Interior Department to cease, which is substantially the direction of section 13 of the present law. Hence the addition of section 13 in the present law did not have its origin in the conference committee at all, but was carried there from the Senate after that body got through its work of amending the provisions of the bill as it came from the House of Representatives.

It looks very much like that, in the hurry of the adjournment and the discussion in the conference committee over the question of recognizing claims of Indians under treaties, the conferees made an effectual and rapid disposition of the whole matter by inserting for the second subdivision the claims examined and authorized to be examined in the Department, with directions to the court to adjudicate on the same lines for all the cases where trials were necessary.

A report of a Committee accompanying a bill in Congress may be referred to by the court, *not as furnishing a rule of interpretation*, but as showing the intent. (*Smith* v. *United States*, 19 C. Cls. R., 693.) So the occurrences

in Congress and in the conference committee of the two Houses with respect to the law under consideration furnish us a guide to the intent of Congress; and while these occurrences do not furnish a rule of interpretation, there is sufficient matter on the surface to afford us a very fair guide as to what was really meant in conferring jurisdiction with reference to the depredations of Indians on the court after taking it away from the Interior Department.

The passage of the original House bill, or the substitute adopted in the Senate either, compels the conclusion that the examinations of the Interior Department would necessarily cease upon the passage and approval of the measure of either House; for the Department examinations were determined and at an end as soon as the court acquired the jurisdiction of any depredation cases at all.

That the report of the conference committee was accepted in the Senate upon the idea that the jurisdiction conferred on the court was the same for all the cases is shown by the language of Senator Chandler, of New Hampshire, who, speaking for the select committee of the Senate when the bill was first under discussion in that body, stated that "there are no substantial outstanding claims which have not been hitherto presented to the Secretary of the Interior. That is a matter of inference, of course, but it is the belief, I think, of the members of the Senate committee that there are no claims which are likely to come before this tribunal which have not been hitherto presented to the Secretary of the Interior. Therefore I cling to the belief that the total amount which will be required under the Senate bill will not

exceed $5,000,000 or $6,000,000." (Cong. Rec., 51st Cong., 2d sess., pt. 3, vol. 22, p. 2852.)

So, likewise, Senator Paddock stated that "the purpose of the committee was to make this bill, should it become a law, consonant in all its features and provisions with the *general system of law which has existed from the beginning.*" (*Ib.*, p. 2902.)

That payment was to be restricted to malicious trespasses to property, theft, "and perhaps sometimes robbery" caused by friendly Indians, and was so understood in the Senate by everybody, the friends as well as the opponents of the pending bill, is also shown by the statement of Senator Turpie, of Indiana (Cong. Rec.,vol. 22, p. 2908), and by the statement of Senator Faulkner, of West Virginia (*Ibid.*, p. 2911), and the general discussion relating to what depredations were being provided for.

AMITY.

What is amity? The logic constructed by desire earnestly urges that the term is idiomatic and must not be measured by the ordinary acceptation of its meaning, but is one peculiar to the language of international agreements and therefore technical in character and use. The average individual at all familiar with the synonyms of language, however, is unable to see any distinction in the meaning of the term whether employed in a billet-doux, an act of Congress, or in a treaty between belligerents. Amity means peace and friendship. A treaty of peace and friendship is a treaty of amity, nothing more, nothing less. The fact that the term has nowhere received a spe-

cial definition, and is not to be found in legal writings, and has no place in the law lexicons, is suggestive of the conclusion that where nations or belligerents and treaty-making powers have made use of the term the flags are furled, the hatchet buried, and friendly relations between the parties resumed. This does not necessarily mean affection, as friendship must be confined to a few. But to live *amicably,* or in amity with all men, is a point of Christianity.

> "Beasts of each kind their fellows spare;
> Bear lives in *amity* with bear."

In construing the word the court below was left to give to it only such significance as is recognized in dictionaries of standard authority. Taking it then in its ordinary and common signification, it was rightly held that amity indicated a state of peace and good will between the Indians on the one side and the United States upon the other, and inasmuch as this state of affairs did not exist between the Bannocks and our people, it resulted that no jurisdiction was incident to or inherent in the court in the case at bar.

The Century Dictionary of the English language, after giving the original Latin derivation of the word "amity," has the following definitions and illustrations:

> Friendship in a general sense, harmony, good understanding, especially between nations; political friendship, as a treaty of amity and commerce.
>
> Great Britain was in league and amity with all the world.—*Sir J. Davis,* Ireland.
>
> These appearances and sounds, which imply amity or enmity in those around, become symbolic of happiness and misery.—*H. Spencer,* Prin. of Psychol.

> I much prefer the company of plowboys and tinpeddlers to the silken and perfumed amity which celebrates its days of encounter by a frivolous display.—*Emerson*, Friendship.
>
> *Synonyms.*—Friendliness, kindness, good will, affection, harmony.

Hunter's Encyclopedic Dictionary defines the word "amity" as used in ordinary language as friendship, harmony, mutual good feeling; when used of private persons, as opposed to quarreling; *when used of nations, as opposed to war.*

Webster's International Dictionary defines amity as friendship, in a general sense, between individuals, societies, or nations; friendly relations; good understanding, as a treaty of amity and commerce; the amity of the Whigs and Tories. It is given as synonymous with harmony, friendliness, friendship, affection, good will, peace.

The use of the word "amity" in the American part of the treaty with France in 1778 has been shown by Nott, J., in *Love* v. *United States et al.* (29 C. Cls. R., 332), to be accidental. The translator who rendered the term into English naturally used "amity" as the equivalent of "amitié." In the Jay treaty of 1794 the term "amity" appears in the title, but the context of the instrument shows the use of the term "peace and friendship." In the case cited, Judge Nott thought (*Love's Case, supra*) that this action of the commissioners is proof of the fact that the phrase was the equivalent of the Latin derivation in the title. In the first "Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers," May 19, 1796 (1 Stat. L., sec. 6, p.

469), it was provided that any person guilty of killing an Indian belonging to any nation or tribe of Indians in amity with the United States should suffer death; and this was repeated by acts of 1799 and 1802, and is said to have been repeated or employed in fifty different statutes, almost exactly as it appears in the act we are now considering.

Therefore,

> When a word has been thus employed through a century in numerous acts of Congress and with reference to the same subject-matter, our international relations with the Indian tribes, it is manifest that it must be taken and used in the last statute in the same sense that it was employed in the first. The judiciary can not ascribe a new meaning to it at any point in the series; what it meant at first, it means always and now. The question then is, What did it mean in 1796, when the law declared it to be murder to kill an Indian of a tribe "in amity with the United States"? (*Love, administrator*, v. *United States and the Rogue River Indians*, 29 C. Cls. R., 332).

TREATY RELATIONS NOT THE EQUIVALENT OF AMITY.

The condition of amity necessary to be shown as one of the prerequisites to entitle the claimants to recover is not satisfied by the mere existence of treaty relations. It is not every act of hostility that disrupts treaties of peace and friendship, but the collision of armed forces in the prosecution of the rights of the respective parties has that effect. Where a treaty of peace and friendship exists between any Indian tribe and the United States the condition of amity is presumed *prima facie*, for it is not

likely that amity would exist unless there was a treaty, as the Commissioner of Indian Affairs decided in the case of one Hedgepeth; but this presumption is not conclusive, and may be rebutted by proof of the actual existence of a hostile condition.

Where a treaty does not contain provisions for peace and friendship, then the condition of amity must be proven to exist, and the burden of proof is upon the claimant.

Where a treaty of peace and friendship exists, or where, in case there is no such treaty, the condition of peace and friendship is shown to exist between the tribe of Indians and the United States, this can not be changed to a condition of hostility by the acts of individuals of either party. The defendants admit that where the condition of amity is shown to exist by the provisions of a treaty or by evidence *aliunde* this condition is presumed to continue until a condition of actual war or hostility is proven, and is not changed by proof of individual depredations.

Amity is not synonymous with treaty relations; it is not necessarily a part of any treaty, although generally included as a treaty condition. While amity is not strictly a legal term, yet it is a word of such fixed and exact meaning there is apparently no room for controversy wherever it appears. The term has no limited technical meaning which is recognized in any legal writing. It is necessarily synonymous with the definitions of the popular dictionaries. The words given as equivalents of amity are applicable in the absence of a more definite meaning to international and public relations. In so far as the relations of the Indians and the United States are

concerned, the word has a broad meaning. The term as used in the act of March 3, 1891, is in line with all previous legislation of Congress respecting payment for Indian depredations. The fourth, sixth, and fourteenth sections of the acts of May 19, 1796, March 3, 1799, and March 3, 1802, and other acts since that time contain the precise expression of the act under which the suit in this case was brought. It has been suggested that the early language on this subject furnished the procedure for the United States to obtain the surrender of certain Indians committing depredations from treaty-making Indian tribes; that the treaties of Indians at that time with the United States presupposed the jurisdiction of the offending parties and the right to demand their surrender from the nation of Indians to which they belonged. This theory, however, will not do, because the United States at that time controlled, or attempted to control, the Indian tribes within our territory upon the principles afterwards laid down by this court, where it was declared that the Indian tribes or nations were dependent communities within the United States and not independent of our laws.

Cases exist where treaties with the Indian tribes expressly provide that the depredations of individual members shall not break the condition of peace which existed with the United States. In such cases the court would hold that predatory bands committing lawless acts within the sanction of the nation can not break the treaties. A case of this kind is that of *Preston Beck, administrator*, v. *The United States and Navajo Indians*, decided by the Court of Claims many years ago, under the act of June 30,

1834. This was a case referred to the court by Congress to find and report the facts and where the finding was in favor of the claimant, the court at that time having no jurisdiction to enter judgment. The proof in the case showed that a small number of Indians belonging to the Navajo Nation committed the depredation; that the Navajo Nation as such was at peace and in amity with the United States, although there were members of the tribe committing depredations upon the settlers; the United States and the Navajoes were also in treaty relation by virtue of articles of agreement ratified by the Senate September 9, 1850. It was urged in the case on behalf of the Government that because of the frequent depredations committed by members of the Navajo Nation upon citizens of the United States the relation of amity required by the act of Congress did not exist. In delivering the opinion of the court the following language was used:

> It is true that New Mexico was not comprehended within the Indian country as that was defined in the act of 1834, for New Mexico was not acquired by the United States until the treaty of Guadalupe Hidalgo, February 2, 1848, when it became the property of the United States and subject to its jurisdiction. But after that and on the 9th day of September, 1849, a treaty was made between the United States and the nation of Navajoes, in which it was recited that by the treaty of Guadalupe Hidalgo those Indians were placed under the exclusive jurisdiction and protection of the United States, and then provided that the laws regulating the trade and intercourse with the Indians should be extended over the Navajo country. We think the purpose and effect of this was to make the Navajo country "Indian country."

> Then the treaty declares that "perpetual peace and friendship" shall exist between the contracting parties, and we think this placed the Navajoes in amity with the United States, and that this relation thus created between the nations could not be altered by the depredations of individuals of either of them, for which, indeed, the treaty provides.
>
> Thus the Navajoes committed the depredations when their tribe was in amity with the United States, and passed from the Indian country into a territory inhabited by the citizens of the United States, and this brings the claim of the petitioner within the seventeenth section of the act of 1834.

The decision of the court in the foregoing case does not announce the doctrine urged by counsel for the appellants that amity means treaty relation. The decision merely holds that the condition of peace and friendship existing between the nations and shown by the treaty entered into between the United States and the Navajoes could not be altered by the depredations of individuals of either party without their sanction. It would be unreasonable to say that this could be done upon general principles; and in view of the fact that the treaty itself provided in express terms that the depredations of individual members should not break the condition of peace which existed, it would seem that there was but little left for the court to do after it was shown that the general body of the Navajo Nation of Indians still maintained friendly relations. If, however, the depredations were not the result of petty thieving and highway robbery, but were accompanied with acts of violence from organized bodies of armed Indians, slaughter, rapine, and murder, the holding would necessa-

rily have been that the treaty was broken and that amity did not in point of fact exist. If amity means treaty relations, then Congress, in effect, said peace was the status, while war was the real condition.

WAR INDEMNITY NOT NECESSARILY IMPLIED BY TREATY OF PEACE.

The writers on international law say that treaties by which we simply agree not to do any evil to an ally, to abstain, with respect to him, from all harm, offense, and injury, are not necessary and produce no new right, since every individual already possesses a perfect natural right to be exempt from harm, injury, and real offense. Such treaties, however, become very useful, and incidentally necessary, among those barbarous nations who think they have a right to act as they please. They are not wholly useless with nations less savage. Grotius divides treaties into two general classes—first, those which turn merely on things to which the parties are already bound by the law of nature; secondly, those by which they enter into further engagements. There are treaties of alliance, defensive and offensive; treaties of commerce for the mutual interest of the parties in furtherance of trade; treaties of navigation for the promotion of the interest of the marine; treaties of limits fixing boundaries; treaties by which we barely promise to do no injury, and treaties concerning things not naturally due. There are treaties of amity used interchangeably with treaty of peace. Whatever may be the rule respecting indemnities for the violation of treaties where special things have been under-

taken to be performed, nobody ever claimed that the exaction of damages could be demanded as of right for the act of a belligerent power in treaty relation for the peace in going to war or in resuming hostilities wherever that was once the condition between the parties. The exaction of damages, it is true, against the defeated parties to the controversy in their collective capacity is sometimes the tribute which the vanquished pays to the victor, but no instance can be found in history where the damages are claimed because of a violation of the general treaty to keep the peace. The legal questions involved in the breaking of the treaty by the one party or the other never find a place in the adjudications of the courts, and the laws are silent not only in the clash of contending forces, but ever afterwards on the question of responsibility for broken pledges under treaties, on the mere question of keeping the peace.

It is true indemnities are sometimes exacted from the inferior power and payment enforced by the stronger party to the controversy. Instances may be said to be frequent where this has been done in conflicts between civilized nations. And there are a few cases where the Indian tribes have been mulcted by the United States in the payment of a sum imposed for the purpose of indemnification, as for instance in the fourth article of the treaty of 1855 with the Rogue River Indians, where a sum of money was agreed to be paid by the United States in consideration of the cession and relinquishment of certain land and $15,000 was retained by the United States and applied to the payment of claims of the whites for property destroyed by that tribe in the "late war" (1853). The treaty provided

the method of ascertaining the extent of the liability, but the amount to be paid was fixed in the treaty according to the usages of international dealings where the vanquished is made to pay tribute to the victorious power.

HOSTILITIES DISSOLVE TREATIES.

Against the proposition that the relation of amity is the equivalent of a treaty contract for peace and friendship is the established rule that the obligations of treaties are dissolved by hostilities. Amity is the equivalent of a treaty for peace as long as the parties to the treaty choose to observe their agreement. With the breaking of the treaty enmity in a legal sense takes the place of amity.

It has been shown that the general principle announced by writers on international law precludes an action to recover the value of private property taken by the public enemy in time of war. (Cases cited *supra.*)

It may be admitted that it is not unusual for the successful party to a war to exact indemnity from the defeated nation for the cost and damages of the war. This may be a cash indemnity, as was exacted of France by Prussia in 1871, or a cession of territory, as exacted by the United States of Mexico (9 Stat. L., 922). The analogy can not exist in the case of the Indians under the acts of 1885 and 1891 with the examples given, because the exaction of the cash in the Franco-Prussian war and the exaction of territory from Mexico by the United States did not rest upon any previous treaty stipulations. The price in each case was the penalty paid by the vanquished party to the conqueror, and previous treaties had no relation to the result.

The authorities hold that treaties containing provisions relating to matters permanent in their nature, such as previous public debts, boundaries, and the tenure of property, are only suspended by war, and revive as soon as hostilities cease; but no exceptions can be found where there is but a general obligation in the treaty to refrain from acts of violence and attacks upon the persons and property of the subjects of the other contracting party. An exception of a different character is that stated by Chancellor Kent (Com., vol. 1, p. 420), where he says: "If a treaty contain any stipulations which contemplate a state of future war, and make provision for such an emergency, they preserve their force and obligation when the rupture takes place. All these duties of which the exercise is not necessarily suspended by the war subsist in their full force." It is therefore as much a paradox to say that the obligations of a treaty which govern the parties thereto in time of peace continue to be the rule in time of war as it is to say that the condition of amity exists because it is provided for in a treaty, when the parties to the treaty have broken it by taking up arms. The rule is that the obligations of the parties are considered as dissolved by the hostilities, and the duty of amity imposed by the past agreement is necessarily suspended.

The general rule certainly is that whatever subsists by treaty is lost by war. (2 Marten's Law of Nations, chap. 1, sec. 8; 2 Vattel, chap. 10, sec. 175; 1 Kent's Com., Lacy's ed., p. 176.) Peace merely restores the two nations to their natural state. (Vattel, lib. 4, ch. 1, sec. 8.)

And this doctrine is conceded by the Supreme Court of the United States in *Society, etc.*, v. *New Haven* (8 Wheat.,

491), where the court said that while the doctrine contended for is not universally true, nevertheless there may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a *permanent* arrangement of territorial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war; and the court said "such a construction was never asserted," and consequently held that the title to lands already vested under a treaty could not be divested upon the termination of the treaty by war.

The charge upon Indian annuities on account of the depredations of individual members of the tribe liable was in the nature of things applicable to a state of peace, and ceased with war. Treaties stipulating for annuities to be charged on account of depredations did not profess to aim at perpetuity and to deal with those cases where the treaties were broken by the United States or by the tribes, resulting in a resort to arms; or where the question of who broke the treaty was open between the parties. Under treaties providing for indemnification nothing of a permanent nature was contemplated except upon the condition that each side was to remain peaceable. Napoleon said treaties were made to be broken. The United States understood about as well as did the Indian tribes that this was peculiarly so with reference to treaties liable to be broken from various causes operating upon each party to the treaty, or from citizens of the United States

on the one hand and individual members of the tribes on the other. Our people were bold and enterprising and continually encroaching upon Indian reservations, while the tribes were continually resisting these aggressions of white men in quest of land and resentful of the presence of the whites. Gain and love of conquest and the spirit of adventure combined to make the white man aggressive, while the traditions of the tribes urged them on to the business of war. Except the few effeminate and degraded types of the race of North American Indians, the tribes were and now are natural fighters, with very many incentives to indulge the passion inherent in their nature. No uncivilized people on earth and no race so utterly ignorant of what we call the science of war ever accomplished so much as the Indian tribes in battle whose only really aristocratic business was fighting. Our people well knew this, and the tribes understood the meaning of civilization's advance. Hence both white and red men were prepared for war at any time. But the United States never undertook by any law, or by statutory implication, to put a premium upon that state of affairs which would result in precipitating a war and then paying its own citizens for losses suffered in the encounter. Settlers and reservation Indians alike were to have no inducements to break the peace. Payment for the depredations of Indians was not to be counted on when the peace was broken by actual hostilities of the tribe, or by any considerable number of a tribe, because the policy of the Government was to maintain treaty relations and amity wherever practicable and afford no cause for hostilities.

The thing sought in the Bannock treaty was peace, and a pledge of honor accompanied the agreement to keep the peace. But the tribe, as a tribe, did not agree to forfeit any annuities for their acts of war. The treaty having been once broken, upon the termination of the ensuing hostilities nothing revived but peace, with such further stipulations as were imposed by the new agreement. The violation of any one article of a treaty is a violation of the whole treaty, as all the articles are dependent on each other and one is a condition of the other. Without going into the causes of the Bannock war in detail, it is enough to say that the Indian tribes in this record claim grievances sufficient to justify the outbreak, and that the obligation of peace was the result of tribal wrongs inflicted by the other contracting authority or citizens of that authority. Indemnity can not be claimed by any citizen under the treaty of 1868. Neither do the terms of the treaty with the Bannocks now justify any claim for indemnity. It declares (Article 1, Revision of Indian Treaties, p. 932):

> From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.
>
> If bad men among the whites or among other people subject to the authority of the United States shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at

once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States to be tried and punished according to the laws, and in case they willfully refuse so to do the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States; and the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper; but no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

It will be seen that no white person could under the terms of this clause of the treaty claim reimbursement from the annuities of the tribe without doing certain things. Nor can appellants claim here under the treaty because the record does not show a compliance with the condition under which the claim could ever have been made. The whole scheme was to provide a civil proceeding that should operate as effectively upon bad men among the whites as upon bad men among the Indians. Proof

must have been made to the Indian agent and notice given by him so that delivery of the wrongdoer to the United States should be made in case bad men among the Indians should commit wrong or depredation upon the persons or property of persons subject to the authority of the United States and at peace therewith. The great object was to prevent race wars and preserve the tranquillity of the frontiers. This provision of the treaty for Indian liability is in accord with the provisions of the trade and intercourse laws of 1834, which clearly had these objects in view. Compensation for loss of property was subordinate to the general good sought to be accomplished. The record in this case not disclosing any attempt to comply with these conditions, damages could not have been adjusted by the Commissioner of Indian Affairs during the time the Interior Department had the jurisdiction. How then can it be said that the defendant tribes are chargeable on account of the depredations committed by reason of the treaty, and on what theory can the contention stand that the claim was filed with the Interior Department for investigation under the act of 1885 and subsequent acts? The logical conclusion is, and must be, that the claim of Marks & Wollenberg was not such a claim as was authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and under subsequent acts.

The claim then in this case acquired no rights by virtue of its filing with the Secretary of the Interior, and conse-

quently had none in the transfer thereof to the Court of Claims. It rests upon the sole ground that it must be a claim for property taken or destroyed by Indians belonging to some band, tribe, or nation in amity with the United States without just cause or provocation.

When hostilities ceased between the United States and the Bannocks and Pi-Utes in 1878, the provisions of the treaty of 1868 with respect to depredations committed during the war upon our citizens were waived, if any such depredation claims existed. There was nothing in the terms of the new peace that covered war claims. The United States asked for nothing and the Indians gave nothing. Damages arising during this war are therefore not the subject of payment.

There can be no legal *presumption* that the Indians were the aggressors in any case. To put the matter in the position least favorable to them it would be necessary in each case to take new evidence and ascertain by *whom* the treaty was broken. This would be a task extremely difficult, if not impossible.

Liability for depredations exists where the depredations fall within the description contained in the statutes relating to Indian depredations, and no further. This liability is drawn from the peculiar political relations between the Indians and the United States. But those political relations do not constitute the authority of the Court of Claims or of any court to enforce that liability except where such jurisdiction be conferred by positive enactment; and it is reasonable to expect that the statutes which confer it should conform not only to the general

rule of international law which exempts all Governments from payment of war losses to their own citizens, but also to the previous statutes, upon which alone is based the claimants' right of action.

But it is contended that the Indian wars are merely domestic acts of violence and not war in the technical meaning of the term. If the status of war has a fixed legal meaning, as contended for by counsel, are there any limitations applicable to the outbreaks of Indian tribes and that condition of affairs where force is used by armed bodies of men acting in concert under the leadership of a chief, having the semblance of a military organization and prosecuting its rights by force? And if an Indian tribe is in that state in which a nation prosecutes its right by force, what are the limitations that differentiate the force used by the tribe from that of any other treaty-making power?

THE BANNOCKS POSSESSED OF BELLIGERENT RIGHTS IN 1878, AND THEIR HOSTILITIES OF SUCH A CHARACTER AS TO SUPERSEDE THE STATUS OF AMITY.

The specific contention is that the Bannock hostilities of 1878 lacked the legal essentials of that kind of a war which dissolves friendly relations and supersedes the status of amity by that of enmity—first, because it was a mere temporary, spasmodic, predatory raid of unorganized savages; second, because war was never declared or announced in any official manifesto; third, because the hostilities did not abrogate the existing treaty in its executory stipulations for subsidies; and fourth, because

war and enmity can not be predicated of mere insurgent subjects, and especially of those who have lived before and since that time upon the bounty of the Government.

Much research and learning have been exhibited to show that the Bannock hostilities, during which the appellants lost their property, were limited to persons and places, and that their operations amounted merely to a qualified state of hostilities and a "war *quoad hoc*." We are told that there are distinctions between hostile operations and enmity; that war, in the sense that it is contradistinguished from amity, should not be allowed to be confused with casual, local, or temporary hostilities and insurrections of a temporary character.

The political incidents suggested by claimants to show that the term "amity" is not identical in meaning or coextensive in scope with any of the words assigned as equivalents for it, in considering the character of Indian hostilities in the case at bar, can have no application here, inasmuch as the findings show the existence of that condition of things incident to warfare and the actual *fact* of war. There was proof satisfactory to the court of actual hostilities, and the findings are conclusive of that condition of affairs which show the destruction and taking of horses and cattle, the burning of houses and homes, the laying waste of farms and crops, the killing of men, women, and children, violence, savage atrocities, battles; open, notorious, and flagrant war, in point of fact.

That enmity in the sense that independent nations attain can be predicated on what counsel in cases like that at bar are pleased to term the actions of an incoherent, unorgan-

ized band of savages subject to the control of the United States, is settled by the nature and character of the hostilities, by the relations of the tribes to the United States as independent or *quasi* independent powers, by the belligerent rights which the political department of the Government has accorded to the Indians (not only in making treaties with them, but in the general dealing of the country with the tribes), and by a line of judicial decisions aside from the findings of the court in this case which it is too late now to ignore or set aside.

The legal status of the Indian tribes and their relation to the United States have been the source of a great deal of controversy, but, as stated by a distinguished member of the bar, "Be it said to the credit of our judiciary, the courts have constantly upheld the rights of the inferior and weaker race as against the superior and the stronger."

In the early history of the Government Congress had "the sole and exclusive right and power" of "regulating trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." (Articles of Confederation, Art. IX.) Two classes of Indians are here recognized—those who had no tribal relations and those who did have. Those who maintained their tribal relations had a separate national character. When the Constitution was adopted there was a provision that Congress had the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. I, sec. 8, Const. U. S.) But the definition of a tribe was

not given, and the Indians were left out of the account in providing for representation, for "representatives and direct taxes shall be apportioned among the several States * * * according to their respective numbers, * * * including those bound to service for a term of years, and excluding *Indians not taxed*, three-fifths of all other persons." (Art. I, sec. 2, Const. U. S.) This contained an implied authority of taxation by the State, and the courts soon took hold of the question. The peculiar relations of the Indians to the United States, the assertion of our title to the land of the country and the extinguishment of the Indian title of occupancy, either by purchase or by conquest; the degree of sovereignty which should be exercised by this country over the tribes, the principle of the *quasi* independence and separate nationality of the Indians as nations and their capacity to carry on wars as belligerents, immediately became the subject of adjudication in the Supreme Court of the United States. The first case was that of *Johnson* against *McIntosh* (8 Wheat., 543), where it was declared that discovery gave an exclusive right to extinguish the Indian title of occupancy of lands either by purchase or by conquest. The next case was that of the *Cherokee Nation* against *Georgia* (5 Pet., 1), where Chief Justice Marshall declared that an Indian tribe or nation within the United States was not a "foreign state" within the meaning of the second section of the third article of the Constitution, so that such tribes could not sue in the courts of the United States; but the opinion expressly held that "the numerous treaties made with them (the tribes)

by the United States recognized them as a people *capable of maintaining the relations of peace and war.*" This decision denominated them "domestic, dependent nations."

In *Worcester* v. *State of Georgia* (6 Pet., 515) it was held that the laws of Georgia were not operative in the territory occupied by the Cherokee Nation, because Indian nations were and always have been considered as distinct, independent political communities, retaining their original rights. In deciding this case the principle stated in *Johnson* v. *McIntosh* was quoted, and the court said: "From the commencement of our Government Congress has passed acts to regulate trade and intercourse with the Indians which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly considered the several Indian nations as distinct political communities, having territorial boundaries within which their authority is conclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guaranteed by the United States."

"The very term 'nation,' so generally applied to them, means a people distinct from others." The Constitution, by declaring treaties already made as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers which are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves,

having each a definite and well-understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth; they are applied to all in the same sense.

In the same case Mr. Justice McLean said: "The Indians have always been admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them; * * * in the management of their internal concerns they are dependent on no power. They punish offenses under their own laws, but in doing so they are responsible to no earthly tribunal. *They make war and form treaties of peace.*"

Although the Indian nations are denominated domestic nations, and their relation to the United States resembles that of a ward to his guardian, and although these nations are local dependent communities (*United States* v. *Kagama*, 118 U. S., 375), nevertheless the principle of the *quasi* independence and separate nationality of the Indian tribes has been repeatedly recognized in later cases in the Supreme Court of the United States as well as their exemption from control by State legislation. (*United States* v. *Holliday*, 3 Wall., 407; *The Kansas Indians*, 5 Wall., 737; *The New York Indians*, Id., 761; *United States* v. *Forty-three Gallons of Whisky*, 93 U. S., 188; *Holden* v. *Joy*, 17 Wall., 211; *United States* v. *Kagama*, 118 U. S., 375.)

That treaties with the tribes have not been without consideration, as some suppose, is shown by the fact that this court has said, in *United States* v. *Forty-three Gallons of*

Whisky, that "the acquisition of territory has been the moving cause of all Indian treaties, and will continue to be so until Indian reservations are confined to very narrow limits." And again it was said in this case that "as long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom and on what terms they shall deal."

In the case of *The Kansas Indians* (5 Wall., 737) it was *held* that the action of the political department of the Government settles as to whether any particular Indians are a distinct people with a tribal organization, or whether the organization has been abandoned and the Indians incorporated with the great body of white people.

Anyone familiar with the history of our dealings with the Indians will admit that treaties have been forced upon them and purposely executed, not so much to secure the Indians the rights for which they had stipulated as to effectuate the policy of the United States, as was said in the case of the removal of the Choctaws, in 119 U. S., p. 37, *supra*. This case, however, stated that "the rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations." (*Choctaw Nation* v. *United States*, 119 U. S., 28.)

The language used in treaties with the Indians should never be construed to their prejudice. How the words

of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction. (*Worcester* v. *Georgia*, 6 Pet., 515, *supra*.)

That Congress can exercise the right of eminent domain by granting a right of way for a railroad through the territory occupied by tribes has been affirmed in *Cherokee Nation* v. *Kansas Railway Company* (135 U. S., 641); but "no one has ever supposed that the Indians could commit treason against the United States," citing *Johnson* v. *McIntosh* (8 Wheat., 543, *supra*).

That members of the Indian tribes may, like the subjects of any other foreign Government, be naturalized by the authority of Congress and become citizens of the United States was settled in the celebrated Dred Scott Case (19 How., 393); but as long as individual Indians maintain tribal relations, exercising the right of self-government, they are not citizens, and their right to become hostile, without the pains and penalties attached to the violent acts of citizens, is unquestioned. "They are alien though dependent powers." (*Elk* v. *Wilkins*, 112 U. S., 94.)

The States have never asserted the power to regulate the concerns of Indians beyond the suppression of crime. In the case of *Seneca Nation* v. *Christie* (126 New York, 122) the subject of the extension by the State of New York of her criminal laws over the remains of the tribes within the State is put upon the ground more for the protection of the fragments of the tribes than for any other purpose. Who would think of comparing an outbreak of savage Indians with local domestic disturbances, as the whisky insurrection of 1794, or the Dorr rebellion in

Rhode Island in 1841–42, or as the violent outbreaks of citizens subject to the authority of the States and the General Government, where the sheriff has the power to summon a *posse comitatus* to arrest the offenders? Domestic acts of violence like these would not be called war, although in 1894 the violence of great bodies of strikers seemed dangerously near to armed resistance to the authorities of the State and National Government bordering on treason. But there is an essential and all-sufficient distinction, in legal contemplation, between the acts of subjects or citizens, bound to allegiance by our laws, and the acts of *quasi*-independent communities, subject to our dominion, it is true, but with rights well defined and materially different from those of citizens.

What is war? The question is answered by this court in the *Prize Cases* (2 Black, 666), where it is defined to be "that state in which a nation prosecutes its right by force." The exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, are what we term, in the means and modes of exercising this course, belligerent powers. In the case under consideration the Bannocks were invested with belligerent powers.

But it is said that war was never declared or announced in any official manifesto, and that Congress alone has the power to declare a national or foreign war, and that hostilities with the Bannocks were never publicly proclaimed by the United States. But in the *Prize Cases* (*supra*) it was declared that the President, while having no power to initiate or to declare a war either against a foreign nation or a domestic State, is bound to accept the challenge with-

out waiting for any special legislative authority; and Lord Stowell is quoted in the statement that "it is not the less a war on *that account*, for war may legally exist without a declaration on either side." It is so laid down by the best writers on the law of nations.

Whenever an Indian tribe has taken up arms against the whites our Government has used its troops for the suppression of tribal outbreaks without waiting for a public proclamation. It has not always been the case that the Government has acted with alacrity and promptness. But wherever it could do so such an outbreak has been met in the shape it presented itself without waiting for Congress to baptize the acts of the Indians with a name. It has sometimes happened that, without waiting for the gradual development of Indian plans, commanding officers of the Army have anticipated coming events by striking the first blow, as in 1867, when General Hancock inaugurated the campaign against the Southern Cheyennes and burned an Indian village because of sporadic savage attacks of the individuals of the tribe. Public proclamation of the legal existence of war with foreign parties is customary, but not essential to the fact by any means; and where the Indians are concerned proclamations have been the exception, not the rule, as people on our frontiers unfortunately knew in too many instances. Sometimes considerable progress was made with Indian hostilities before the Government got well under way for their suppression, and there are instances on record where tribal insurrections and positive hostilities were suppressed by the Army without any action at all on the part of the political department of the Government.

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized "a state of war as existing by the act of the Republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

Against the proposition that a declaration of war is necessary, and that, legally, Indian hostilities must be regarded as a state of peace until the Congressional sanction of a declaration of war, is the decision of this court that the provision of the Constitution placing in Congress the power to declare war is applicable in general to a national or foreign war; that a civil war does not need a public proclamation, and that a war against insurgents, *dependent States, or powers* requires no public proclamation, but that its actual existence is a fact of which the court is bound to take notice.

The true construction of section 8 of Article I of the Constitution, which give to Congress the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; * * * to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," is the right *to begin* a war as a voluntary act of sovereignty. The right of the executive department of the Army to repel hostilities actually existing was left unimpaired.

Long before the passage of the act of March 3, 1891, the Court of Claims passed upon the question of what was necessary to constitute a legal Indian war, with which construction Congress must be presumed to have been familiar. The question was elaborately discussed as far back as 1865, in the case of *Alire* v. *The United States* (1 C. Cls. R., 233), in which a claimant prosecuted his suit to establish his right to a warrant for land under the provisions of an act approved March 3, 1855, as a surviving soldier of a war against the Apaches. The evidence showed an Indian outbreak in New Mexico in which a portion of the Apache and other tribes were implicated. General Garland, of our Army, made a requisition upon the governor of New Mexico to furnish him aid, and Alire volunteered and served as a scout in the hostilities and participated in one battle. The court held that the hostilities were of such a character as to require no Congressional declaration, and that a war between the United States and the tribes required none; and that troops engaged in the military service against the Indians were equally entitled with other troops to the benefits given by various acts of Congress. The court further held that the same rules of peace and war that regulate the intercourse and fix the relations between the United States and foreign independent nations do not apply to the Indian tribes.

After recounting the military operations against these Indians, with the action of the departments of the Government, Chief Justice Casey, in delivering the opinion of the court, said:

> Though there may have been no formal declaration of war by Congress, nor any public official proclama-

tion of its existence by the President of the United States, yet it can scarcely be doubted, from the official acts and recognitions by the President and by Congress of the existing hostility by these tribes, and the means taken to suppress the disturbance and chastise them into submission, there existed that condition of things between the Government of the United States and those tribes known, in common parlance as well as legal enactments, as an "Indian war." In our intercourse and dealings with these savage tribes, regarded in our law as independent and domestic nations, we do not apply the same rules of peace or war that regulate the intercourse and fix the relations between us and foreign independent nations. Though we have had many "Indian wars," it has been but rarely that Congress, in which the Constitution vests the right to declare war and make peace, has enacted or resolved a formal declaration of hostilities against any tribe or tribes. It has been regarded as sufficient that they have by law provided for the protection of our frontier against the attacks of these tribes and for calling out volunteers to aid the army, leaving the executive department to act according to the emergencies as they arise. And Congress has seldom failed to recognize and ratify such acts by voting appropriations to pay the troops called out and defray the expenses incident to such expeditions. This case has been no exception to the general rule. And taking into view the actual condition of things in the Territory of New Mexico between the 1st of January, 1855, and the 1st of August of the same year, with the acts of this Government during that period and subsequently, we can not say that this was not an "Indian war." There were repeated acts of depredation by the Indians upon the property of the white settlers, many acts of cruelty, murder, and

> massacre, such as are incident to savage warfare. These were repelled and punished by the forces of the United States under a general officer in command of the department. Volunteers in aid of these forces were called out upon requisitions made upon the civil governor of the Territory, and these were duly organized and mustered into the service of the United States. Expeditions were planned against these Indians, their country invaded, and battles fought against them, and finally a treaty of peace concluded with them.

The international incidents, such as embargoes, retaliatory tariffs, and the mobilization of troops, presented for the purpose of showing that these things do not necessarily amount to a breach of amity, cut no figure in the determination of these acts of the Indians which resulted in armed hostility on their part and the use of the troops of the United States to compel subjection to our authority. Reprisals by commission, or letters of marque and reprisal, may be conceded to be compatible with a state of peace, as when the aggressions of France upon our commerce caused Congress to inaugurate a policy of capturing French vessels while the spoliations were in progress. The decision of the Supreme Court in *Bas* v. *Tingy* (4 Dall., 37), involving the question of whether France was an enemy during the period of these maritime operations, does not aid the claimants here. The court held that the conditions of war were sufficient for the purpose of allowing salvage in the case of the recapture of a vessel, and, *for the purposes of the case*, France was held to be an enemy. The case does not confirm the results claimed for it, that the limited use of military force did not con-

stitute the status of enmity, which in technical language is the precise antithesis of amity. It is true the court said that war was not openly denounced against France and that France was nowhere expressly called our enemy, but the court added, "This only proves the circumspection and prudence of the legislature." (*Bas* v. *Tingy*, 4 Dall., 37.)

No analogy can be drawn from the incidents mentioned in behalf of claimants for the reasons set forth in *Alire's Case* (*supra*); nor can anything favorable to the claimants be drawn from Mr. Webster's contention that captures of ships, imprisonment of persons, and even battles may happen under the practice of retorsion without rupture of the amity relation. Mr. Webster only claimed that these things might happen "and yet there is no *general war*." The amity fixed by Congress in the statute before the court for construction was broken when the tribe named in this record denied the authority of the United States and took up arms against the Government long enough to kill some of our people and get some of their own slain.

I have, I think, sufficiently shown that the hostilities with the Bannocks were of such a character as to abrogate the treaty of 1868 in its executory provisions for subsidies on account of depredations, not only on general principles, but because it has not been shown that the treaty was operative of itself. There is one remaining proposition to be noticed with respect to the Bannock treaty.

For withholding annuities to pay for depredations the treaty is not the equivalent of an act of the National

Legislature, as other treaties of the United States are regarded, because the treaty was not self-executing. In *Foster* v. *Neilson* (2 Pet., 314) this court said: "When the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." In the *Head Money Cases* (112 U. S., 580) the court said that, "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." It is denied, however, so far as this defense for the Indians is concerned, that the United States have changed the conditions under which indemnification for depredations can be obtained under the treaty with the Bannocks. In addition to the obligations imposed by the act of 1871, such legislation would be *ex post facto*, and this was not contemplated. If the compact depends for its enforcement on the honor and interest of the parties to it, as stated in the opinion in 112 U. S., 580, *supra*, then there is no necessity to appeal to the treaty to gauge the liability on account of depredations beyond its literal terms, which were never complied with by the appellants in this case, as hereinbefore shown. To do so is the exercise of arbitrary power and in conflict with every principle of justice.

But it is said that war and enmity can not be predicated of mere insurgent subjects, and especially of those who have lived upon the bounty of the Government.

The civil policy of the United States in dealing with the Indian tribes has been shown to be essentially different from the policy of the Government with respect to its own citizens. Inasmuch as civil and political liberty have never been given to the Indians, it follows that they do not occupy that relation to the United States which the allegiance of citizenship imposes. There is no analogy between the wars of the tribes and the acts of citizens of the States in the matter of making war. In the case of *Texas* v. *White* (7 Wall. U. S., 700) the Supreme Court treated the action of the people of Texas as a rebellion against the General Government with belligerent rights, with all the privileges and consequences growing out of a state of belligerency, holding, however, that the constitutional relations and status of the seceding States remained unchanged. Considered as transactions under the Constitution, the ordinance of secession adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to the ordinance, were held to be null; and it followed by this decision that Texas did not cease to be a State nor did her citizens cease to be citizens of the Union. If this were otherwise, the State must have become foreign and her citizens foreigners. In such case the war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Continued payment of the annuities did not necessarily recognize the binding force of all the parts of treaties with the Indian tribes. The act of March 2, 1867 (14 Stat. L.,

515, now sec. 2100, Rev. Stat.), does create the presumption where annuities are paid thereunder that the Bannock tribe was recognized by the United States as in amity therewith during such period, but such presumption is not conclusive of the amity *in fact* of such tribe. (*Leighton* v. *United States*, 29 C. Cls. R., 288.)

The brief period of time in which the Bannocks were engaged in hostilities does not change the fact that these hostilities did actually exist.

The statute of March 2, 1867 (sec. 2100, Rev. Stat.), is a recognition in itself of sudden hostilities on the part of the tribes, notwithstanding treaty stipulations, and that the stipulated annuities should be resumed by Congress as soon as the hostilities ceased. There was a purpose in this. That purpose was to do everything to keep the Indians at peace, and to provide annuities for parts of the tribe that did not join their comrades in making trouble. That the Government was inconsistent with itself does not prove that it has not had to contend with hostile Indians and with tribes who have made war to such an extent as to cause the expenditure of millions of money and the loss of many lives. Congress also knew that Indian wars were frequently incited by our own people; that bands of Indians professing friendship to the settlers were first attacked by the whites and driven from their hunting grounds. It was attempted to atone by legislation and by continual payment of annuities for actual atrocity to the Indians on the part of white men. And so far as our policy on paper and the payment of annuities were concerned, it may be said that the policy of the United States

has always been to adhere to treaty obligations with the tribes. Pursuant to this policy we find it provided that—

> No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law. (Act of July 26, 1866, sec. 2087, Rev. Stat.)
>
> No part of the moneys which may be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses incurred in Indian affairs, to pay annuities due, or to be used and expended for the care and benefit of any tribe or tribes of Indians, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof. No claims for Indian depredations shall be paid until Congress shall make special appropriation therefor. (Act of July 15, 1870, sec. 2098, Rev. Stat.)

The rules and principles of international law apply to hostilities wherever the rights of belligerents exist. The tribes having been accorded these rights, they can not be held responsible in the courts for highway robberies committed by their individual members, or for murders, where these acts of violence occur during actual hostilities. They cease to be robberies and murders where the public peace has been broken and the obligations of peace have been dissolved by a state of public hostility. They are not then denominated robberies and murders, but lawful acts of men trying to rob and kill each other in war. The killing of Lieutenant Casey, of the United

States Army, in 1891, by an Indian named "Plenty Horses," in South Dakota, and the decision of the courts on the trial of this Indian for murder, illustrates the proposition. The facts of this case, according to the report of the Commissioner of Indian Affairs, clearly showed that the killing was without provocation, premeditated, and deliberate. Plenty Horses was arrested, indicted, and tried in the United States court on the charge of murder, but was acquitted on the ground that at the time of the killing a state of war existed between his tribe and the United States, and that the killing of Lieutenant Casey was an incident of the war and not murder under the law. This decision has been universally accepted as just and as embodying a principle consistent with the usages of men and of nations wherever the perpetrator of a deed similar to that of Plenty Horses owed no allegiance to the Government like that of which Lieutenant Casey was an officer, and where the occurrence happened when the opposing parties were connected with hostile forces.

THE OBLIGATION OF THE BANNOCK TREATY, IF ANY, NOT ENFORCEABLE IN COURT.

But liability does not rest always on the question of the infraction of the treaty. It is, indeed, within the power of the United States, as the stronger nation, to compel the Indian tribes to make compensation for damages inflicted by them during a war, whether or not that war was brought on through the fault of the Indians. As a matter of fact, such reparation has usually been exacted.

Probably no Indian tribe ever broke the peace with the United States without being worsted in the encounter and deprived of more property in lands and goods than they obtained by plunder. In many cases, as shown by learned counsel, a money indemnity has been required. Such compulsion, however, is a matter of national sovereignty requiring legislative action. Such action was not exercised by Congress upon the termination of hostilities with the Bannocks, and the right of the citizen for reclamation was not recognized, and without legislative sanction the citizen can not resort to the courts. The courts can enforce nothing based on the previous treaty under such circumstances. Jurisdiction has never been given to the courts to adjudicate at the suit of any citizen the terms of a treaty for the payment of an indemnity for the loss or destruction of the property of the citizen during a war with the other party to the obligation.

In view of the law of nations, which should govern all civilized powers in their dealings with other peoples, whether great or small, it would be an unheard-of and atrocious thing to take the property of the Indians to pay for damages caused during the war long after the close of that war, no agreement for such compensation having been made at the time. If it be done, it will not be done by the courts. In the absence of legislation expressly commanding such confiscation for acts of war, or in case of any doubt, courts of justice should not sanction such a proceeding. Yet this is what learned counsel ask of the court to do in following the decision of the Secretary of the Interior. And this is not all. The court is asked to

do this not only in defiance of the ordinary custom and law of nations, but to do it after the parties to the war have long since closed hostilities and resumed amicable relations by concluding another treaty which makes no provision for money indemnity for damages committed during the war. (25 Stat. L., 687.)

This case does not stand alone in that regard. If the court should elect to accept as final the decision of the Secretary of the Interior in regard to his own jurisdiction under the act of March 3, 1885, it would be compelled to hold with the following specific decisions:

That, included in the allowances of the Secretary of the Interior in cases examined by him under the act of 1885 and subsequent acts, and reported to Congress as set forth in the findings of fact marked X, are claims predicated upon the earlier treaties. For instance, the Secretary allowed a claim under the treaty of February 18, 1861, for depredations committed in July, 1866, notwithstanding the fact that there had been an intervening war with the Indians charged and a new treaty of peace made on May 26, 1866. (Ex. Doc. No. 77, 2d sess. 49th Cong., p. 10.) There are other claims reported by the Secretary for depredations by the same Indians committed in 1869, 1871, and 1872, allowed under the above treaty of May 26, 1866, notwithstanding the fact that another war had raged in 1867 and 1868, and a new treaty of peace made on August 25, 1868. (Ex. Docs. Nos. 34, 1st sess. 50th Cong., p. 8; 103, 2d sess. 50th Cong., p. 14; 122, 1st sess. 51st Cong., p. 8; 277, 2d sess. 51st Cong., p. 12.)

Another claim allowed after the treaty of 1866 appears to have been one for a depredation committed in 1864, ignoring a prior treaty made in 1861. Depredations committed long ago, with supervening treaties, are apparent throughout these allowances, although in the later treaties nothing whatever was said about indemnities other than such cessions of land as were required of the Indians at the time.

In none of the cases do the later treaties mentioned stipulate for a money indemnity for past depredations. These cases, which are taken at random from the findings in this regard, serve to show in what difficulties the court may involve itself, and to what contradictory conclusions it may be led, by accepting the construction of the Interior Department as final on its conclusions of law.

There is another principle of application here in opposition to the correctness of the action of the Interior Department in making indiscriminate allowances of claims under the act of 1885 and subsequent acts merely because there was a treaty of peace with the tribe charged, and which denies to Marks & Wollenberg the right to say that their claim was authorized to be examined under any treaty creating an obligation for payment. The treaty which terminated the war in which claimants lost their property carried an amnesty as complete for the damages occasioned by the Bannocks as if a special act of Congress had in terms declared that amnesty was extended for every act of damage to every individual as well as to the tribe collectively. (Vattel's Law of Nations, p. 439.)

Amnesty, which includes future protection of the persons of the belligerents as well as the agreement to refrain from the confiscation of property, is always implied in any treaty of peace where the treaty is wholly silent on the matter of amnesty. This is the rule which writers on international law uniformly declare to be the measure of treaties referring to peace only when civilized nations agree to lay down their arms. The failure to stipulate the reparation leaves the damages caused by either party to the war as if such damages had never happened. The proposition is too reasonable to offer reasons for its existence where civilized people deal with each other. Its obviousness is even more apparent in the dealings of the Government with the tribes, inasmuch as the continuance of the annuities with Indians deprived of their lands and means of subsistence was the only alternative to avoid perpetual warfare or their final extinction.

DISTINCTION BETWEEN INDEMNITY FOR DEPREDATION AND FOR WAR.

But, it has been said, if we do not hold the treaty Indians liable in every case where the tribe was at war, we establish a distinction which has no foundation in reason and none in the treaty. This is plausible, but fallacious. It seems to me that the distinction has a foundation both in reason and in the treaty. In the treaty provision is expressly made for the one case, while none is made, and none would be made in any treaty, for the other. The same power that makes the treaty can break it. A treaty-making power is never legally liable for

money damages for an infraction of the treaty unless it is expressly so stipulated; and even then in the case of war the indemnity clause could be enforced only as a national act on the part of the victorious power, and not by the *courts* of either party on the petition of individual citizens. Open and avowed hostilities between two nations abolish and abrogate existing treaties for peace; while some provisions of previous treaties may survive, the stipulation for peace does not; and such a stipulation can therefore afford no foundation for judicial action by either party.

But, even if there were such legal foundations for damages, a case is not made out against the Indians. As before stated, it has not yet been proven that the treaty was broken by the Indians rather than by the United States and its citizens. Who is to tell in this and similar cases that the Indians were at fault in beginning hostilities? It would seem impossible for the court to enter into the proof of the question of who was responsible. There are numerous cases where Indian wars have been incited by our own people. In a late case before the Court of Claims against the Cow Creek and Rogue River Indians of Oregon, which illustrates quite a number of other cases, it was found by the court, on the evidence of the claimant himself, that a company of volunteers had been quietly organized by the whites, who struck the first blow on a large band of Indians professing the utmost friendship to the settlers, and that those of the tribe who survived the slaughter hastened to their reservation, and, persuading the few who were remaining there to join them,

commenced the work of retaliation and did it fearfully well. (*Love's Case,* 29 C. Cls. R., 332.) The famous Sand Creek massacre in Colorado in November 29, 1864, made general the Indian war then prevailing throughout the Northwest. In this affair nearly the whole of Black Kettle's band of friendly Cheyennes were massacred, and of the occurrence the official reports show that—

> Exasperated and maddened by this coldblooded butchery of their women and children, disarmed warriors, and old men, the remnant of these Indians sought the aid and protection of the Comanches and Kiowas, and obtained both. The combination which followed embraced all the tribes of the plains from the Red River of the South to the Red River of the North and resulted in the general Indian war of 1865, which cost our people many valuable lives and $40,000,000 in money. Peace was concluded with the southern tribes in October, 1865. Peace was likewise made with the Missouri River Indians late in the same autumn, and the Indians engaged in the recent hostilities (Sioux) gave notice that they also were willing to bury the tomahawk. (Report Committee on Indian Affairs, Senate Ex. Doc. No. 13, p. 2.)

No question has ever been made that this friendly band of Cheyennes were brought into the then prevailing hostilities by the cold-blooded massacre of their women and children by the troops under Chivington. Again, in 1867 roving tribes with no real chiefs, constituting a sort of democracy, each man doing as he pleased, insisted upon certain white people withdrawing from roads on their reservations, and General Custer, under orders from General Hancock, inaugurated a campaign against these

Indians in April. A station having been burned and several men killed, General Hancock ordered an Indian village of about 300 lodges, together with the entire property of the tribes, to be burned, which precipitated hostilities with the Cheyennes of so serious a character as to call for military expeditions and the expenditure of a large amount of money. It is recited among the archives of the Government that this movement of General Hancock's was regarded as unfortunate, inasmuch as the Cheyennes and Arapahoes were at the time comparatively peaceable and friendly. (Rep. Commissioner of Indian Affairs, House Ex. Doc. No. 240, 2d sess. 41st Cong.)

The mistake of the claimants' position is apparent if we remember that the difference between the cases they put is not in the *fact* of responsibility, but in the *character* of its responsibility. For the individual depredation the tribe can not justly be held liable to any but a pecuniary penalty; therefore in the interest of discipline and peace the provision is made for pecuniary penalty in case the individual offender can not be apprehended. This is exactly analogous to the provisions in England of the old statute of Winchester (13 Edward I, chap. 1), by which the hundred was bound in pecuniary damages to any person robbed within its precincts unless they captured the felon and brought him to justice.

It would not be pretended that this statute, which provided for the case of robberies by individuals, could be applied in case the hundred or the parish rebelled as a whole against the authority of the king. In such case other measures for punishment would be necessary. So,

where an Indian tribe, as a tribe, breaks the stipulation for peace, the punishment must be a punishment of the whole tribe. It would be absurd to say that this has been provided for in a legal way by a treaty made by the same power which is now to receive the punishment. The violator of the treaty of peace is remitted to a higher law, the law of nature. The result is war, with the penalties of war. It has been left to the present claimants to contend that, long after the close of the war by a *new* treaty, the courts of the victorious nation should base on a *previous* treaty, which had promised only peace, judgments for losses sustained by individuals as a consequence of the war.

LEGISLATIVE POLICY OF THE GOVERNMENT UNIFORMLY ADVERSE TO THE PAYMENT OF WAR CLAIMS AND THE ASSUMPTION OF LIABILITY OF THE CLAIMS OF OUR CITIZENS ARISING IN A STATE OF WAR.

It has been the general policy of the Government never to pay for property destroyed in war. The obligation to reimburse the citizen or the subject for the destruction of property in time of war is not in accord with the general policy of any Government, whether it be the Government of a republic or that of a monarchy.

Vattel says:

> Is the State bound to indemnify individuals for the damage they have sustained in war? Said damages are of two kinds—those by the state itself or the sovereign, and those done by the enemy. Of the first kind some are done deliberately and by way of precaution, as when a field, house, or garden belong-

> ing to a private person is taken for the purpose of erecting on the spot a tower, a rampart, or any other piece of fortification; or where his standing corn or storehouses are destroyed to prevent their being of use to the enemy. Such damages are to be made good to the individual, who should bear only his quota of the loss. (Law of Nations, p. 403.)

The authorities on international law uniformly say that losses which the state has occasioned, not willfully, but through necessity and by mere accident, in the exertion of her rights, are not the subject of action against the State. The same may be said of damages caused by the enemy. Vattel says, further:

> All the subjects are exposed to such damages, and woe to him on whom they fall. The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the state strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted and every individual in the state would be obliged to contribute his share in due proportion, "a thing *utterly impracticable.*" The writers say that these indemnifications would be liable to a thousand abuses, and there would be no end of the particulars, and it is therefore presumed that no such thing was ever intended by those who united to form a society. (Law of Nations, p. 402.)

The pension system of the United States and of Governments generally is about as far as the state can safely go. Nor is there any reason why the property of the citizen should be the subject of compensation while his life should have no regard from the state. If payment is to be made

for the destruction of property, why should the Government stop at the point of affording indemnification for property and not compensation to the families of those who in warfare have lost their lives at the hands of savage Indians?

The extent of the obligations of the Government to our citizens has never included by any general law the payment for property appropriated, damaged, or destroyed by the public enemy. There have been special acts of appropriation in particular cases, but practically all of these cases covered claims where the property was in the military service of the United States. The general law of April 19, 1816, entitled "An act to authorize the payment for property lost, captured, or destroyed by the enemy while in the military service of the United States" (3 Stat., p. 261), did not include anything which changed the rule of nations in this regard. Under this act the amounts adjusted and paid through Richard Bland Lee, appointed commissioner on behalf of this country (American State Papers, Volume Claims, pp. 490–496) were insignificant. Mr. Calhoun contended that the Government was not liable for losses of any kind inflicted by the public enemy, while Mr. Clay held that the citizen should be paid for losses incurred in the public defense. But in the debate the latter declared for the principle of compensation only when the property of the private individual was seized by the Government and converted to the uses of the community, in consequence of which it was destroyed. (Annals of Fourteenth Congress, second session, 382–424.) Later in the debate Mr. Clay was will-

ing to admit that for losses of the kind mentioned compensation should be made if the same could be done without too great a "dilapidation" in its means. But it was not claimed by anyone that losses inflicted by the enemy should be made the subject of public compensation where the Government had no connection with the loss. Where private property is taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and where a military officer, charged with a particular duty, impresses private property into the public service, or takes it for public use, there is then a duty on the Government to pay.

The Supreme Court has said that "unquestionably, *in such cases*, the Government is bound to make full compensation to the owner," subject to the limitation that in these cases the danger must be immediate and pending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for it is the emergency that gives the right. (*Mitchell* v. *Harmony*, 13 How., U. S., 115.) The opinion in this case excludes the consideration of any claims but those named, and beyond those the policy of the Government did not go. Even as to claims against the United States growing out of the destruction or appropriation of or damage to property by any part of the Army or Navy engaged in the suppression of the rebellion Congress found it necessary to restrict the jurisdiction of the Court of Claims July 4, 1864, for the payment of demands for subsistence supplies furnished to the Army. (13 Stat. L., 381.) In the discussion over this act Mr.

Wilson said (speaking to the legal right of citizens to demand satisfaction) that the right "never did exist since the first time it was declared that the King could do no wrong." And Mr. Stevens said: "As to claims for losses inflicted by the enemy, I know very well that they are not to be thought of." Under the act of July 4, 1864, it was held that the term "appropriation" included all taking and use of property in the course of the war not authorized by contract with the Government. (*Filor* v. *United States*, 9 Wall., 45.) The obligation to pay claims described by Vattel is one which has been recognized on appeals to Congress in some cases, of which the claim of J. Milton Best for the destruction of his house at Paducah, Ky., by the United States troops, affords an example. President Grant vetoed the bill for the relief of Best, it may be remembered, though his veto was not sustained.

The act of 1887, "to provide for the bringing of suits against the Government of the United States" (ch. 359, sec. 1, first proviso, 1 Supp. Rev. Stat., 2d ed., p. 559), defined the jurisdiction of the Court of Claims as follows:

> All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

The proviso to the foregoing jurisdictional conditions expressly denied the court the power to hear and determine claims commonly known as "war claims," or to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

A still more emphatic precedent is to be found in the action of Congress with reference to the war with the Creek Indians in Alabama. The legislature of that State passed a joint memorial addressed to Congress asking remuneration for those individuals there who had sustained losses in consequence of depredations committed upon their property by hostile Creeks in the prosecution of their savage warfare against the white settlers. It was shown that the hostile Indians had devastated plantations by destroying the then growing crops; had burned dwellings; had carried away and appropriated to their use personal property of the citizens of great value to the owners, and that considerable personal property appropriated from necessity by Indians that were friendly had been carried away. The committee to whom was referred this memorial reported that they did not doubt the truth of the statements and had given the subject all the examination and deliberation due to the sufferings of a portion of our citizens, but declared that they were obliged to reject them in the conscientious discharge of duty, in which decision they were sustained by precedent and the settled policy of the Government. The report further shows that the principle laid down, which was adverse to the payment of the

claims, may have been departed from in a very few cases "from the haste in which business is sometimes transacted or other inadvertence." It was stated that if the amount of this class of claims in 1800 was an impediment to making a favorable report, that amount had been fearfully increased from that time within which the country had had an embargo, a nonintercourse act, a war with England, a violation of our neutrality by the belligerent powers of England and France, and almost a constant collision with some of the Indian tribes, by which the property of our citizens had perished at the wharves or been destroyed on the ocean and on the land. The report recites that—

> The Government is equally bound to protect the property of our citizens employed in commerce as it is to give protection to those whose capital is employed in agriculture. If the Malays, or pirates, should seize a vessel, murder the crew, and take the cargo to their use, no one would say the United States were bound to remunerate the loss. A misunderstanding may exist between this Government and a foreign power by which the millions employed by our citizens in commerce and navigation may be swept from the ocean and rendered valueless, and yet no one would remunerate the sufferers from the Treasury of the United States. Thousands of such sufferers now exist, and they have combated poverty for years without relief. Such is the case with those who have suffered by Indian depredations on the frontiers, as the settlements have progressed Southwest and West, and by those who suffered during the war with Great Britain which commenced in 1812. Every section of our country has at some period been a sufferer for the common benefit of the whole Union, and if an accurate and just account were

> taken it would be found that the losses have been distributed with a tolerably even hand. The Committee on Claims in the Senate, on the 23d of January, 1800, in a report made on the petition of Daniel Smith, of the State of Tennessee, wherein a compensation was asked for losses arising from the depredations of Indians, held this language: "Your committee have seriously considered the principles upon which the claim of the memorialist is founded, and lament sincerely his loss; but knowing that an immense number of the citizens of the United States have been plundered of property to a very great amount, both by land and sea, in the same unwarrantable manner, and believing the whole revenue of the United States would scarcely be commensurate to meet the demands of applicants in similar cases, should compensation be made in this, the committee are of opinion it would be inexpedient to open so extensive a field, and, therefore, that the prayer of the memorialist can not be granted." (Am. State Papers, Volume Claims, p. 222.)

Subsequently a report was made to Congress denying compensation to sufferers from the depredations of the Sac and Fox Indians in Illinois in 1832. (See Reports of Com., 2d sess. 25th Cong., No. 351.) In that report the committee say:

> These losses were incident to a state of war with savage tribes on the Western frontier. They bear oppressively on settlers exposed to the unrestrained revenge of the Indians; but it has not been the practice of the Government to remunerate for such losses, and it may be doubted whether it is within the constitutional powers of the Government to do it. No part of the property was in the service of the

> United States, and they are not the insurers of the property of their citizens against savage aggression, nor against the aggression of civilized nations.
>
> The destruction of the property of our citizens on the frontier by a tribe of Indians may be good cause of our going to war, and so may the capture of our vessels on the ocean be a good cause of war against the nation whose subjects have thus disregarded their moral, social, and national obligations; but in neither case has the sufferer a claim on the United States.
>
> The committee regret the losses the claimants have sustained, but they are similar to those sustained by others on the frontiers as settlements and civilization have extended westward from the Atlantic coast. (Rep. No. 1028, H. R., 2d sess. 25th Cong.)

If these were the views of Congress in 1838 and again in 1864, it is far from reasonable to suppose, after the great and colossal losses of fortune sustained by the class of people known as loyal citizens of the United States, that Congress intended to single out a few thousand claimants as special objects of Government favor and provide for their payment because they had lost property in periods of Indian hostility.

The decisions of the Court of Claims are in full accord with the general doctrine that the United States do not undertake to pay for claims created by the ravages of war. As far back as 1856 (C. Cls. R., No. 21, June 28, 1856) the court decided in the case of *Cassius M. Clay* that—

> This claim, which is for the value of goods taken by the enemy in time of war, can not be maintained. We think the reason of that rule is as applicable to the seizure of personal property as it is to the dam-

> ages to real estate. The present claim is not founded on any general law, and this court therefore furnishes no remedy for the loss.

In a suit brought for depredations committed by the Pottawatomie Indians during the war of 1812, that tribe being one of the allies of Great Britain, the court affirmed the doctrine of the Clay Case by stating:

> In such a case it has never been supposed that the injured individual can call upon his Government for redress. Such wanton destruction of private property by the enemy is one of the unavoidable calamities of war to which the citizens of an invaded country are subject. The Government, by acknowledging this liability for such injuries, would take from its citizens one of the strongest inducements they have to protect their property and furnish the enemy with additional reason for destroying it. (*Joseph Loranger* v. *The United States*, No. 96, C. Cls. R., 1st sess. 35th Cong.)

This was a case for the value of flour, wheat, corn, and oats, the private personal property of the claimant, destroyed by the enemy. This case was decided in 1857. It came up again before the court under the jurisdictional act of March 3, 1891, upon transfer from the Interior Department, and was one of those cases recently decided for a second time adversely to the claimant.

A claim for injuries alleged to have been committed against private property of a citizen of the United States in 1847 by hostile forces during the war between the United States and Mexico was decided adversely to the claimant in the case of *Peter M. Paillet* in 1859. Paillet's house was occupied and damaged. But the court said the damage was the result of chance and dangers of war and

the disturbed state of the place of his residence. The court suggested that if the claimant were in circumstances to need charitable relief the claim would present a strong case for its benevolence, but it was wholly insufficient to sustain a claim upon the justice of the United States for indemnity, and "upon the legality" and "upon the equity" of the claim the case was dismissed. (C. Cls. R., No. 220, 1st sess. 36th Cong.) Another case, in 1859, was that of *Mary A. Williams* v. *The United States*, where the same general doctrine against the right of recovery for the value of private property taken or destroyed during hostilities was maintained. This appears to have been a case for Indian depredations alleged to have been committed soon after the battle of Dunlawton, at Harford plantation, by the Seminole Indians, in 1835. (C. Cls. R., 231, 1st sess. 36th Cong.)

I have referred to these reports of committees in Congress, the debates in that body, the decisions of the courts, and the text writers on international law to sustain the proposition that it is a matter of grave doubt whether it is within the constitutional power of Congress to provide for the general payment of claims for property destroyed by the enemy in time of war; but even if within the province of legislation, to further show that the policy has never been adopted by this Government. With all the lights before Congress the act of 1891 was not intended to be an exception.

DEPARTMENTAL PRACTICE AND CONSTRUCTION.

The first and strongest argument in support of the contention that the Indians are chargeable in damages under

the first section of the treaty with the defendant Bannocks is supposed to be found in the fact that the Secretary of the Interior so interpreted the treaty in giving effect to the act of March 3, 1885. It is attempted to show this by voluminous references disclosing numerous cases allowed by the Secretary under this and similar treaties. In support of this practice of the Interior Department the findings show that cases which arose during disturbances with the Indians were not disallowed under the act of 1885 and subsequent acts, by the Secretary; nor was jurisdiction under said acts refused or denied by him because of any defect in or want of treaty stipulations to render the Indians chargeable for their depredations, or because they were committed in time of tribal hostilities. In making the allowances it is claimed the Commissioner of Indian Affairs uniformly referred to section 1 of the treaty of July 3, 1868 (15 Stat. L., 673), as the treaty creating the obligation of the Bannocks for payment, and that the report to Congress by the Secretary of the Interior of such allowances refers to that and similar treaties as creating the obligation for payment. In as many as ninety-seven cases mentioned the treaties merely promised to preserve peace, but contained no provisions for payment for depredations out of annuity funds. In two hundred and three cases allowed by the Secretary the treaties contained provisions pledging the tribe to peace or to refrain from depredations, but contained no provision for the course of action of the tribe if hostilities or depredations occurred, or for payment for depredations out of annuity funds.

An examination of these references reveals the fact that in the cases set forth as allowed the procedure required by the treaty was not followed; and the references do not identify the cases with the case at bar, in which the procedure required by the treaty was not followed. The contention of the claimant thus breaks down in its very foundation.

The whole superstructure of the argument is built upon the assumption that the Secretary of the Interior has held in opposition to the decision of the court below; whether this be true has not been proven, unless the cases cited are shown to be on the same footing in this particular. True, it may be shown by some of the references that the Secretary did allow certain claims where the treaty contained only a general agreement not to commit depredations, and where no method of procedure was specified; but this would not apply to the present case, in which, besides the general stipulation for peace, there is another clause concerning depredations in which a mode of procedure is specifically provided.

The holding of the Interior Department in the early cases would seem to have been on the exact line of the decision in this case in the court below; for in an opinion by the Commissioner of Indian Affairs, dated February 3, 1860, the following is given as one reason for refusing to take jurisdiction over a certain case:

> Moreover, it does not appear that these claims were ever submitted to the Indians in council, that they might be heard in their defense. It may be said that in the condition of affairs that would have been a mere formality, resulting in nothing if there were

no obstacles to prevent its being done altogether; but the law demands that it shall be done, and as an executive officer I have no equity power to give relief against its positive requirement. (Letter of A. B. Greenwood, Commissioner, to Hon. W. K. Sebastian, chairman Senate Committee on Indian Affairs.)

Here the procedure which had not been followed was required by an act of Congress, but the principle is the same; and the showing is not sufficient to prove the practice of the Department to have been inconsistent with the opinion just quoted. There is nothing to show that this precedent was ever reversed, or that where a method of procedure was established, whether by law or by treaty, it was ever ignored by the Secretary.

It is significant that since March 3, 1885, no special appropriations have been made by Congress to pay Indian depredation claims except in cases authorized by the judgment of the Court of Claims under the act of March 3, 1891, showing that Congress gave no attention to the matter.

The Greenwood letter of 1860 was followed substantially in the course of practice of the Indian Office, as will be seen by the following exhibit:

DEPARTMENT INTERIOR,
OFFICE INDIAN AFFAIRS,
Oct. 23, 1865.

M. C. KIRBY, Esq.,
Golden City, Colorado Territory.

SIR: Your letter of 9th instant is received, making inquiries relative to your claim for loss of horses taken by the Sioux, &c.

In reply I have to inform you that this office adjusts such claims as are held against Indians who are at peace with the Government. The only redress for any other must be through Congress.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

DEPARTMENT INTERIOR,
OFFICE INDIAN AFFAIRS,
July 17, 1866.

Hon. W. E. NIBLACK,
House of Representatives.

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, enclosing a claim of Patrick Munoy for depredations by Arapahoe Indians at Pawnee Reservation in June, 1864.

This office can afford no relief in the case. The Indians charged with the offense were hostile at the time to the Government, and, moreover, are not, it is believed, parties to any treaty providing for the payment of annuities out of which claims for depredations could be satisfied. The claimant's recourse is to Congress.

The claim is herewith returned.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

It is claimed, however, that the action of the Interior Department upon Indian depredation claims after 1866, but prior to March 3, 1885, established the precedent for the payment of depredation claims irrespective of the peace or hostility of the tribes committing the depredations, notwithstanding the course of the Indian Office under dif-

ferent administrations. In connection with this claim a tabulated list of cases compiled from H. R. Ex. Doc. 125, 49th Cong., 1st sess., has been exhibited as showing or tending to show the practical construction of the law prior to the time indicated.

The claims in the first list were allowed as represented. Of the Indians named as defendants, the Klikitats and Rogue Rivers have been declared hostile. The other tribes named were probably at war, but the court has not passed upon the question. The treaties with the Cow Creeks, Umpquas, Rogue Rivers, and Coquilles, against whom twenty-two depredations are charged in the list, did not make any express provision for the payment of damages for depredations committed by members of the respective tribes. The chiefs bound themselves, however, to exert themselves to their utmost power to restore property so stolen. The other tribes, charged in thirty-six cases on the list, were parties to treaties which expressly provided for answering in damages out of annuity funds for any depredations committed by members of the tribes. (10 Stats., 1134; 12 Stats., 929; 12 Stats., 954.)

The second list of cases reported in Ex. Doc. 125, where it is specially stated that no treaty exists, is correct. The forty cases disallowed, suspended, or withdrawn do not seem to be material.

The third list is also correct with the exception of No. 72, on page 4, which it is stated was paid in 1854. The statement in the executive document is not that it was "paid," but that it was "sent to Second Auditor," the same entry which was made in the unallowed claim imme-

diately preceding this in the document. This does not necessarily imply payment. The sixty-eight cases in which no action was taken are clearly immaterial.

It is significant that wherever these allowances were passed in the Indian Office nothing came of them generally; the claims simply slumbered for want of Congressional action. With respect to their payment, and, for that matter, to the payment of any Indian depredation claims, under the allowances of the Secretary of the Interior, usage and time have consecrated nothing. The small appropriations made by Congress from time to time in special cases on account of such claims were under circumstances peculiar and exceptional in character and the result of generosity rather than right. The appropriations in such special cases supply no precedents, and in construing the act now before the court for consideration the determination of the questions does not involve the disturbance of any settled rules of property upon which the repose of claimants generally depends.

No formal decision was ever made by the Interior Department construing the word "amity." Its construction as being "treaty relations" is only inferred from its adjudications in those cases where there was a departure from the rule announced by Commissioner Cooley in 1865 and in 1866. I have been unable to find anything bearing upon the subject outside of the rules announced for the government of the Department prior to 1885. After the act of 1885 there is but one document extant bearing upon the subject. The findings of fact (VIII) disclose an opinion rendered August 23, 1886, for the guidance of the

Interior Department in the consideration and allowance of claims under the act of 1885, and the subsequent act of 1886. The opinion was that of the chief law clerk and addressed to the Assistant Secretary of the Interior, from which, in substance, it appears that the act of 1886 required the special report of the office on each claim to include a reference to the date and clause of the treaty creating the obligation for payment, with the further opinion that no provision was made under said acts for an investigation of claims in favor of citizens on account of depredations committed by Indians not holding treaty relations. There is nothing in the opinion that gives the right to claim that a fixed rule of construction was adopted; but if there is, then the courts are not bound by that construction which authorized the investigation and allowance of a claim merely because there was a treaty. The investigation of these claims by the Indian Office was necessarily very perfunctory, and was made with knowledge of the fact that payments upon them were very problematical. Legal questions were rarely considered, and this fact was well understood. The allowances were oftentimes very arbitrary and sometimes very unjust to the claimants upon the question of values. The means to conduct the investigations were very limited, and, in fact, inadequate for satisfactory work.

This was well understood at the time of the passage of the act of 1891, just as well as when previously Mr. Dawes said in the Senate respecting the authority of the Secretary to conduct the examinations: "The Secretary has the power under the statute, but he has not had the money; * * * whenever a man sent his claim up

here or referred it to the agent of the tribe, when the agent of the tribe got the affidavits furnished by the claimant and sent them up here without any hearing or cross-examination whatever, the Secretary of the Interior has written 'approved;' and the claims come to Congress, thirty-one hundred of them in a single letter, amounting to more than a million and a half dollars." (Cong. Rec., 48th Cong., 2d sess., vol. 16, part 2, p. 1718.) And that these investigations were not only limited, but were absolutely and wholly unsatisfactory to Congress to the last moment, is evidenced by the statement of Senator Paddock, of Nebraska, one of the strongest supporters of the measure, that while he was willing to accept the report of the Secretary of the Interior on pending claims, "some of our associates here are not willing to do that." (Cong. Rec., part 2, vol. 22, 2d sess., 51st Cong., p. 1394.)

Numerous authorities have been cited to sustain the position that the courts should follow the Department construction. Before considering these authorities it is proper to observe a distinction which exists between this case and those cited in the authorities. The cases refer, in nearly every instance, to a long-continued usage, and usually in a matter over which the Departments have naturally exclusive control. The present issue is, however, one of the construction of laws and treaties—essentially a legal question—and the practice of the Department which it is sought to uphold extended over only six years' time. Not only this, another difference arises—the cases referred to in the authorities are cases where an *effective* practice has been maintained by the Department, where money has been paid out or rights acquired under the rulings made;

in the present case there has been no such effective construction or practice. No money has ever been paid out of the Treasury by reason of this practice; no liability has been incurred; no hardship will be suffered by reason of its change. As a matter of fact, the act of 1885 never received careful consideration or judicial construction until the Court of Claims took up the question; Congress has failed to sanction the construction made by the Secretary of the Interior.

Suppose these cases had been examined and allowed by the Commissioner of Indian Affairs under a certain construction of the law, and those allowances had been reversed by the Secretary of the Interior, or had remained unacted upon by him, would it be contended that the construction of the law was complete and binding on the courts? And is the action now complete when it is reversed or suffered to lapse by Congress after having passed through the hands of the Secretary of the Interior?

It is much more reasonable to suppose that Congress intended to refer the whole matter to a court of law for intelligent and harmonious construction than that it meant to tie the hands of the court by binding it in advance to continue the policy begun in this partially completed enforcement of the old law.

LIMITS OF DEPARTMENTAL CONSTRUCTION.

The authority of departmental construction has very serious limits, which are well defined by Endlich, sections 360, 361. The principle there stated, with its limitations, is so applicable to the present case that it is reproduced here at some length.

The construction put upon an act by departmental officers charged with its execution, says Endlich—

> Will, in cases of doubt and ambiguity—*but, it is said, only in such cases*—be adopted by the courts, or, at least, not disregarded by them, except for cogent reasons. As, however, *no such usage can alter the law, it can not, in any proper sense, be binding upon the courts*, bound, as they are, to construe all laws coming before them according to their own judicial views. *Nor, on the reenactment of a statute, with additions, would the departmental construction of the original act control the construction of the new one*, especially where this would make some part of the addition repugnant to the body of the enactment. * * *

A mere general practice which had grown up in a long series of years, on the part of the officers of the Crown, of not using patented inventions without remuneration to the patentee, under the impression that the Crown was precluded from using them without his license, was held ineffectual to control the true construction or true state of the law, which was that the Crown was not excluded from their use. Nor can a custom at variance with the plain meaning of the law be sustained as a construction of it.

This exposition of the law by so able an authority can be successfully combated only by the production of the clearest and most authoritative decisions. Those cited by the claimant do not overthrow it.

In the *United States* v. *Moore* (95 U. S., 763), referred to by the claimant, the question was one of appointment to office—a proper subject of departmental jurisdiction. The statute to be construed was the one under which the

practice of the Department arose. In this case the question is one of construction of treaties and statutes, of taking property to pay damages, essentially a subject for judicial interpretation, and the statute is not the one under which the departmental construction was had, but a later statute *in pari materia*.

In *Emery* v. *The United States* (19 C. Cls. R., 256) it is true that the court referred to the practice of the Department in construing the act of Congress, but it did not do so for the purpose of corroborating it or basing a decision upon it. In fact, of two practices there referred to, one (that referring to the construction of the act of 1879) is expressly overruled and reversed, and the court gave directions by which the statute which had theretofore been nullified by the practice of the Department should be put in full force and effect.

The citation of *Tanner's Case* (25 C. Cls. R., 69) in the court below was peculiarly unfortunate for the claimants. The court there held that the act in question was ambiguous, and without attempting to decide its meaning followed the practice of the Department; but they also cited, with approval, *Graham's Case* (110 U. S., 219), where it is said that the statute there under consideration is clear in its meaning, and

> Such being the case, it matters not what the practice of the Department may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation.

This applies fully to the case at bar. In regard to the question of amity the court below has held that the

meaning is clear, quoting the same maxim above appealed to; and it is certainly plain that, independent of legislation or departmental ruling, a treaty of peace with the Bannocks which prescribed a certain method of procedure to apprehend individual offenders, on the failure of which the tribe would be peculiarly liable, did not authorize or justify a subtraction from the revenues of the tribe to meet any claims against them without compliance with that method of procedure.

In *Swan* v. *The United States* (19 C. Cls. R., 51, 71), relied upon by the claimants, the court said in regard to a construction put upon the decree of a prize court by the Department charged with the duty of making distribution under such decree, "In our view this was altogether erroneous;" and the departmental construction was accordingly reversed.

In *United States* v. *Pugh* (99 U. S., 269) there is the same broad differentiation from this case as found in the case of Moore above referred to. The same is true of *United States* v. *Graham*. (110 U. S., 221.) In the latter case, moreover, the practice of the Department was reversed and utterly condemned. In fact, a better case in point would hardly be desired by the defense. Notwithstanding the fact that the question was one peculiarly proper for departmental construction (being the amount of traveling allowances due officers of the Department), and although the practice of the Department had been *continuous from* 1835 *to* 1884, the Supreme Court held that it was erroneous and reversed it.

It will be seen from these authorities that consideration is indeed given to contemporaneous departmental con-

struction, but that it is considered only when there is doubt or ambiguity on the face of the statute and when the statute under consideration is the same as that construed by the Department; and even then such construction is not allowed to control except in cases where the ambiguity is great, the practice of long standing, and the question one which is properly subject to departmental construction.

RATIFICATION BY REENACTMENT.

It is contended, however, that in the present case Congress, by reenacting the old law by reference, expressed its approval of the construction previously put upon it, and that the intention of the lawmakers, which is paramount in the interpretation of a law, is thus shown to be in the line of the old practice.

The general principle of ratification by reenactment is well known, and is clearly enunciated in the cases cited by the claimants. There are, however, well-defined limits beyond which the doctrine does not apply.

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It may be doubted whether it would apply in the present place even if the construction sought to be continued had been that of a judicial tribunal. In Endlich on the Interpretation of Statutes, section 367, it is said:

> So, the same words appearing in a subsequent act *in pari materia*, the presumption arises that they are used in the meaning which has been *judicially* put upon them, and *unless there be something to rebut that presumption* the new statute is to be construed as the old one.

Again, in section 365, it is said:

> When the legislature puts a construction upon an act, a subsequent cognate enactment in the same terms would, *prima facie*, be understood in the same sense.

The present situation is one in which the old statute was to be construed by the Secretary of the Interior, and that construction to be made effectual by legislation in accordance with his recommendations. The Secretary performed his part and made his reports to Congress. That body allowed the report to molder in its files, and no action in accordance with their recommendation was ever taken. This failure of Congress to approve the action of the Secretary is, perhaps, an indication of the construction put upon the acts of 1885 by Congress, and it is certainly something to rebut the presumption that Congress approved his previous construction.

APPLIES ONLY TO JUDICIAL CONSTRUCTION.

The great distinction is, however, that the doctrine applies only to judicial interpretation. This is shown in the extract from Endlich, quoted above. It is shown also by every case heretofore cited in claimant's briefs.

In *Duramus* v. *Harrison* there had been a long series of decisions by the supreme court of the State. In *Woolsey* v. *Cade* the point had been passed upon by the Supreme Court of the United States. In *Myrick* v. *Hasey* the original statute became a law in 1783, had received repeated judicial construction, and when substantially reenacted in 1834 was rightly held to have the meaning previously put upon the earlier statute.

In *Cota* v. *Ross* the question was put upon the interpretation of a section in the Revised Statutes of 1871, which had been incorporated without change from the revision of 1857. It was held that the repeated judicial construction during fourteen years should govern. *Tuxbury's Appeal* is similar in its circumstances. *In re Murphy*, in the New Jersey Law Reports, is on the consolidation of conflicting statutes, and does not seem to apply. In *Frink* v. *Pond*, decided in 1865, the question was on the construction of a statute passed in 1791, judicially interpreted and twice successively reenacted. In *Evans* v. *Ross* the statute was passed in 1764, reenacted in substantially the same terms in 1794, and again in 1832. The court held that decisions on the first acts were binding in the construction of the last.

These cases, all of which were cited by the claimant in support of his contention, not only illustrate the caution with which the rule is applied, but indicate the limitation of the doctrine to judicial interpretation. If it were not thus limited it would have been differently stated in the text-books; cases extending it to departmental action could have been found in the reports. The failure to so state it can not be due to an oversight on the part of the author quoted, for the whole question of departmental construction is exhaustively discussed in the sections immediately preceding.

Not only have no cases been found extending the doctrine to departmental construction, but in *The Swift Company* v. *The United States* (105 U. S., 694) it was expressly denied such extension. In that case, which was an appeal

from the Court of Claims, the law required the allowance of a certain discount on revenue stamps where the parties furnished their own dies; the Treasury Department, by a general rule and the practice thereunder, made this discount payable in stamps at their face value, instead of in money. This rule was followed from 1862 to 1879, when the action was brought. In the opinion in the Court of Claims the case is thus stated by Richardson, justice:

> This rule, thus applied, has been uniformly acted upon from the passage of the first stamp act, in 1862, to the present time, and has been acquiesced in by dealers in proprietary articles until the present action was instituted in May, 1879. More than $40,000,000 have been collected of other parties for stamps sold in accordance therewith. Congress has several times revised and reenacted the statute on which it is founded, and, with a full knowledge, we may presume, of the construction adopted by the Treasury Department, has made no enactment to change it.
>
> Under these circumstances, whatever may be our opinion of the application of the rule in the first instance to the sale of proprietary stamps for which the proprietors furnished dies and designs, we do not feel authorized to reverse it at this late day.

This would seem to have been as strong a case of departmental construction with subsequent ratification by reenactment as it would be possible to imagine. The uniform action for seventeen years under the construction in question, the general acquiescence of the purchasers, the payment by them of over $40,000,000 under that construction, and subsequent revision and reenactment by Congress of the same statute with no change in this provision, all combine to make a case far stronger than the present one. Yet

the decision of the court was reversed by the Supreme Court and judgment was afterwards entered for the claimant.

This recent decision of the Supreme Court in a case so strong, which is in accordance with the text-books, and which is contradicted by no other authorities, must be sufficient to show that the rule of ratification by reenactment does not extend to constructions placed upon previous statutes by departmental officers. If this case be followed, the claimant's contention has not a leg to stand on; and in any event the doctrine would not support a construction which is so manifestly unsupported by the principles of law.

EFFECT OF THE CONSTRUCTION CONTENDED FOR.

It is contended by the claimant that whether or not the court would be bound by the practice of the Secretary of the Interior, and regardless of the question of whether that practice was in conformity with legal principles, it is apparent that the intent of Congress in passing the law was to continue and transfer the jurisdiction actually exercised by the Secretary of the Interior under the act of March 3, 1885.

This construction would make the Court of Claims merely an agent to carry out the line of practice inaugurated by the Department. The court would be bound then by the decisions of the Secretary in all questions affecting the construction of the prior law. So far as it affects the question of amity and treaty relations, it is a declaration that the construction put upon treaties by the Secretary of the Interior shall be binding upon all courts

of the United States. This doctrine will receive further attention under a subsequent heading. But the effect of the construction contended for would not stop here.

If the practice of the Interior Department in regard to amity or treaty relations is binding upon the courts, then so is the practice regarding citizenship—a requirement which appeared for the first time in the act of March 3, 1885. It is, however, well known that it was the practice of the Department to make the formal finding of citizenship in each case without requiring evidence to that effect—a holding virtually that the word "citizens" in the statute meant simply "inhabitants," as in Revised Statutes, section 2156, and previous statutes. To show this we need go no further than the Valk Case, recently decided (29 C. Cls. R., 62), in which there was a finding by the Secretary of the Interior that the Valks were citizens at the time of the depredation. But the court dismissed the petition in the case on the ground that they were not citizens. Other cases could be cited if necessary.

Other errors of law made by the Interior Department—some of them persisted in for a long time—might perhaps be found. It will not do to assume that the court is to have its hands bound in the administration of a new law which conferred jurisdiction never before exercised by any court.

AMITY ESSENTIAL EVEN IF NOT JURISDICTIONAL.

Even if it should be held that the Court of Claims had jurisdiction of the case at bar under the second clause of the first section of the act of March 3, 1891,

this fact would not alter the ultimate judgment of the court; for if the claim of Marks & Wollenberg was one of those authorized to be examined by the Secretary of the Interior under the act of March 3, 1885, and subsequent acts, nevertheless the amity of the Bannocks at the time of the depredation was an essential fact to be proved on the trial.

Did Congress by the statute of 1891 create a liability on the part of the United States which did not exist before? The claimants insist that the act conferred upon the court all the discretion necessary to give relief that existed in Congress itself. This is a most extraordinary proposition, but it has been urged with such force and vehemence as to merit attention.

The Court of Claims can not imply a liability from a statute merely jurisdictional when none is expressed or where the implication is not certain. Cases that go to the Court of Claims from Congress go there to be tried according to the law, without being shorn of defenses which legally exist. The Court of Claims is not merely a committee advisory to Congress, with the right to pass on the facts only without applying thereto whatever conclusions of law may in the judgment of the court be applicable. If this proposition were not correct, then there would be no appeal to the Supreme Court. But there is a right of appeal in all cases under the general jurisdiction of the court, and that right is expressly given by the terms of the act of March 3, 1891.

> It must now be regarded as a fixed principle in this court that a simple reference of a case by Congress to this court of itself waives no legal defense

> which the Government as defendant may have, excepting only the statute of limitations. When Congress specially sends a case to be heard and determined here, that enactment probably overrides the existing general enactment that such a case is barred from being brought by lapse of time. There are, indeed, cases where the reference of a claim by Congress to this court may operate as a ratification of a transaction which was in terms made subject to the approval of Congress; but apart from these two exceptions it is difficult to conceive of any case where the mere act of referring by enactment will change by implication the law otherwise applicable to the facts of the case. (*Cruger's Case*, 11 C. Cls. R., 766, 770.)

Sometimes cases have been referred where the assumption of a contingent liability, or the ratification of a prior transaction, or the waiver of the statute of limitations is the *necessary implication*, though not expressly stated in the words of the statute, as in the case of *Roberts et al., trustees*, v. *United States* (92 U. S., 41), although in that case there were dissenting opinions by three members of the court; and the opinion of the majority was in reversal of the unanimous opinion of the Court of Claims on the question of what Congress principally intended to refer for adjudication (6 C. Cls. R., 84). The opinion in the Roberts Case in the Supreme Court was put upon the ground that it was plain that Congress principally intended to refer to the adjudication of the lower court the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended to refer the whole subject, the right to compensation as

well as the amount, the claimants, under the circumstances of the case, were in the judgment of this court entitled to compensation. (92 U. S., 49.)

The cases where Congress has made a positive acknowledgment of liability, or where it was intended by the reference to waive legal defenses, are extremely rare. It is therefore reasonable to say that whenever the question of implied liability is presented the language of the reference ought to admit of no controversy, or certainly be so clear that nothing else would reasonably be left for the court to do but find the facts. In the last case which presented the question of an implied liability the Court of Claims as well as this court held against the right of the claimant to recover where claimant brought suit under an act which stated:

> That the claimants be permitted to sue in the Court of Claims, which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention, and closing up of the commission houses and bonded warehouses of said copartners, for the breaking up and interruption of their said business, and for the seizure and detention of the property, books, and papers in and connected with said business by Joshua F. Bailey, collector of internal revenue for the fourth internal-revenue district of said State, or by said Bailey and other internal-revenue officers. The United States shall appear to defend against said suit, and either party may appeal to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding.

The decision of the court below was affirmed by this court, where Mr. Justice Harlan, speaking for the court, said: "The only right waived by the Government was a defense based upon the statute of limitations. There would seem to be no escape from the conclusion that Congress intended that the liability of the Government should be determined by the settled principles of law." (*Cumming* v. *United States*, 130 U. S., 452.)

> These decisions of the Supreme Court more than sustain all that was said in *Cruger* (*supra*), and preclude the judiciary from implying a liability from a jurisdictional statute when none is expressed or where the implication is not inevitable. (*Love, administrator*, v. *United States et al.*, 29 C. Cls. R., p. 332.)

If Congress intended by the jurisdictional act of 1891 to waive any of the legal defenses which might exist to an Indian depredation claim, no matter what its origin, it would have said so in unmistakable terms, and at least it would not have done so inferentially. There is nowhere any intimation that the investigation of the Court of Claims was to be conducted otherwise than judicially. The reference was made to the court as a court, and not to the judges as arbitrators. The determination was to be made according to those fixed rules which govern that court in the adjudication of cases, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice were to be applied by the court that would be if the case had come into the court under its general jurisdiction, except as to those cases which had gone to an award in the Interior Department; and even as to those, upon election of

either side to have a trial, the court was required to give the parties a trial. There was no discretion about it.

Under an act where the Court of Claims was authorized and directed to ascertain and adjudge the amount equitably due a firm, if any, for loss or damage, the Supreme Court held that the word "equitably" meant no more than that the rules of law applicable to the case should be construed liberally in favor of the claimants. (*Tillson* v. *United States*, 100 U. S., 43.)

Whatever may be said with reference to the jurisdiction of the court upon the different classes of claims, tribal liability must rest upon the principles and obligations of international law and the statutes of the United States and those treaties with the Indians to which the statutes refer. Government liability must likewise rest upon the previous statutes or treaties where Indian liability has been theretofore denied.

Through all the statutes we find that depredations of Indians have not been the subject of consideration unless the tribes were in amity with the United States, whether in treaty relations or not in treaty relations. The act of 1885, under which the Secretary of the Interior began the investigation of claims under treaties, was merely an appropriation act containing a direction to expend the specific sum appropriated in the investigation of the pending claims of citizens chargeable by virtue of treaty. There was no authority for the Secretary to allow claims merely because the Indians were in treaty relations. There must have been a specific promise on their part to pay such claims. The act of 1891 is substantially the act

of 1834, limiting claims, however, to citizens, as did the act of 1885, and substituting the words "without just cause or provocation" for the words "that if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act by seeking, or attempting to obtain, private satisfaction or revenge, he shall forfeit all claims * * * for indemnification." That the Secretary of the Interior was merely substituted by the act of 1885 and subsequent acts to take the place of the committees of Congress and make up his reports upon investigations by agents of his own selection in cases where treaties existed was in pursuance of that line of policy adopted by Congress that the Indians were not to be bound to pay for depredations until Congress should specially appropriate for them. (Sec. 2098, Rev. Stat.)

Intention is to be ascertained by considering the entire statute (Sutherland on Interpretation and Construction, sec. 229, p. 317), and intention of the whole act will control interpretation of parts. (*Ib.*, sec. 241, p. 319.)

Where a statute is incorporated in another, the effect is the same as if the provisions of the former were reenacted in the latter for *all the purposes* of the *latter statute;* and the repeal of the former statute does not repeal its provisions so far as they have been incorporated in the act which is not repealed, where the adoption was for the purpose of providing for a subject-matter not within the original statute. (*Ib.*, p. 337, sec. 257.)

Congress understood that the act of 1834 was being substantially reenacted with the claims for inhabitants stricken out; and it also understood that the investigations of the Secretary of the Interior were subject to

revision for any error of law or fact. (Statement of Senator Paddock, *supra;* Cong. Rec., part 2, vol. 22, 2d sess., 51st Cong., p. 1394.) Again, Senator Mitchell, of Oregon, moved to strike out the words "in amity with the United States." (*Ib.*, p. 1856.)

Mr. Chandler, of New Hampshire, when the Senate was discussing what the Secretary had done, gave a full and explicit explanation of the conditions which must exist and be established before a plaintiff was entitled to recover, and from the refusal of the Senate to amend the bill on the very clause about which Senator Chandler was most explicit, there is no other conclusion to be drawn than that the Senate understood Congress was reenacting the condition of the amity of the tribe in every case, and not making a new departure in the principle by which claims of this character have ever been paid. The creation of separate classes of claims for the jurisdiction of the court to which the claims were referred by the conference committee of the two branches of Congress yet left all claims to be adjudicated upon one common principle underlying every demand against the tribes on account of depredations from the beginning, and that was that every citizen who had property taken or destroyed by the domestic nations within our borders, or members thereof, without just provocation on the part of the owner or agent in charge thereof, should be compensated on proper proof; provided, also, the relation of amity was shown to have existed on the part of those who committed the wrong, not necessarily to the individual sufferer by the particular offenders, but to the Government and people of the United States collectively.

This proposition recognized the fact that individual Indians, and, for that matter, a whole band or tribe, may have had some real or fancied grievance against some individual citizen of the United States and carried animosity and violence against such citizen to such an extent as to deprive the citizen of his property. While compensation in such cases would follow under the law as finally enacted, this proposition asserts the only true foundation for the law, that if there was a want of amity at the time of the loss between the depredators and the United States the sufferer took the consequences. Such a person was and is without the statute, which did not create new liabilities nor attempt to create any; a statute that merely took hold of existing claims, and giving effect to the contingent liabilities against peaceable tribes opened the doors of the Court of Claims for the adjudication of such cases according to the law as Congress found it when that body determined to be done with the unsatisfying work of the Indian Office in investigating the claims; and not to pay on the perfunctory reports of the Departments of the Government relating to demands over which hovered so much of suspicion and charges of fraud in their presentation.

ACTION AGAINST UNITED STATES CONSIDERED.

Liability of the United States is contingent and wholly dependent upon conditions, generous in their nature it is true, but nevertheless conditions necessary to be considered in arriving at tribal liability. The Government's promises to pay the judgments rendered under the law where the annuities of the tribes are insufficient for the

purpose are the voluntary acts of Congress, applicable also to that class of cases where under the dangerous provision of the fifth section the court may be imposed on and the Treasury looted at the suit of persons for depredations chargeable to bad men masquerading as Indians. No question can arise in the case at bar respecting the liability of the United States above and independent of the liability of the Indian defendants, inasmuch as the Bannocks have annuities and their identity with the depredators who took and destroyed claimants' property is not disputed. But the obligation of the Government to pay judgments for Indian depredations in certain contingencies affords another reason why the primary liability of the Indian defendants should be considered upon the same principle applicable to suits against the Government alone.

In the argument heretofore presented I have endeavored to meet the claimants on their own ground that the action is primarily against the tribes. I believe that I have shown that a judgment against the Bannocks in this case would be clearly unjust and illegal, that it could not rest on the treaty, and that if this be so it can make no difference that the Secretary of the Interior has held otherwise.

The only logical and consistent construction that can be given to the law, and as being within the purview of the legislature, respecting Government liability, is that which springs from the general obligations of the United States to afford protection to its citizens in time of peace and the failure to do so on the frontiers when this might have been done, resulting in the taking and destruction of the prop-

erty of enterprising people who had gone there. Government liability can not be predicated on what it could not help in every instance. Responsibility was never meant to be assumed for the acts of the public enemy, for these acts were directed against the Government as well as against the individual citizens and against the Government in the persons of her citizens.

The constitutional power of Congress to make the United States liable for damages occasioned by the public enemy was doubted on the complaint of citizens of Illinois and again on the petition of citizens of Alabama. Can the intention be imputed to the Fifty-first Congress to resolve these doubts in favor of the citizens of New Mexico or of Idaho with claims for damages occasioned by the same public enemy where a previous Congress had denied relief to citizens of Illinois and Alabama?

It is commonly said that after a century of legislative promises to ultimately pay for the depredations of Indians Congress finally provided the way in redemption of these assurances by the passage of the act of 1891. Most all, if not all, of the present claimants were never promised anything from the United States. Payment by the United States was never promised to the claimants in this case. Section 8 of the act of February 28, 1859 (11 Stat. L., 401), repealed the Government promise for indemnification in express terms.

The friends of claimants knew too well that the liability of the United States could never be established and was never meant to be imposed for damages occasioned by fighting tribes when it was moved to strike out the words

which admit of the defense of a want of amity. It is left to claimants to contend that Congress either did not know the meaning of the words or was imposed on by the skill of those who were most anxious for the payment by Government of damages inflicted by public enemies, or so confused itself in the use of language as to do what Congress did not intend to do in the passage of the act under consideration. The court can not sanction any such views. It will declare that the primary liability is against the wrongdoers wherever liability exists, and that no liability can exist *ab initio* unless actual relations of peace are shown to have been the true conditions at the time between the wrongdoers and the United States for the acts of bad men among the friendly tribes in depredating upon the property of citizens of the United States. As there is no primary liability in this case because of the unlawful acts of the Bannocks, the conditional and secondary liability of the United States has not arisen.

SUMMARY.

(1) The claim is founded in tort, and the statute creating whatever of right the claimants have to bring and maintain suit for injuries not previously actionable, this statutory remedy must be strictly followed; and the suit being against the Indian defendants under circumstances extraordinary in character and against the United States in derogation of that immunity which every sovereign enjoys, the statute conferring the privilege of suit should be construed with strictness.

(2) The jurisdiction of the court under the act of 1891 is the same in all classes of claims, and the claim in the

case at bar acquired no such rights by virtue of its having been presented to the Commissioner of Indian Affairs under the act of 1888, which authorizes the court to determine the same upon principles different from other claims for the depredations of Indians; and the form and construction of the act of 1891 and its legislative history, with all the surrounding circumstances attending its passage, confirm the proposition that there are no separate and independent jurisdictions resting upon the fact that there are different classes of claims.

(3) The provisions of the statute which prescribe the amity of the tribe committing the injury as a necessary condition to entitle the claimants to recover relate to a condition of actual peace and friendship between the band, tribe, or nation of Indians charged and the United States at the time of the taking or destruction of the property, unaffected by executive action or want of action on the part of the political departments of the Government, and the amity of the offending band, tribe, or nation, or want of that condition, must be determined by the court according to the proofs in the case.

(4) Treaty relations existing at the time of the injuries complained of between the Bannock defendants and the United States are no equivalent in law to the condition of amity prescribed by the act of 1891 as a necessary condition to recovery, but such treaty relations are only *prima facie* evidence of amity, and this presumption not being conclusive may be rebutted by proof of the actual existence of a hostile condition.

(5) Indemnity for the injuries done by the Bannock Indians in time of actual hostilities between that tribe and

the United States can not be implied by or from the terms of a treaty which promised only peace, inasmuch as the Bannocks had belligerent rights, and their liability for acts of war must be measured by the same standards of international obligation as the liability of other powers are gauged in similar circumstances and conditions.

(6) Whatever obligation existed on the part of the Bannock Indians under the treaty of 1869, the same became broken and ineffective for all purposes by the commencement of hostilities between the tribe and the United States, and claims for damages done to any citizen during the hostilities can not be maintained in an action founded on the treaty.

(7) In the treaty with the Bannock Indians, proclaimed February 4, 1869, provision is made for payment for depredations committed by members of the tribe, and a specific mode of procedure is established to enforce such claim. The claimants attempt to found upon the first section of the treaty, which is a declaration of perpetual peace, a liability for another class of depredations, viz, those committed in open war. But no such depredations are referred to in the treaty, no penalty is provided for them, no procedure is established for presenting them, and there is no warrant for their existence except a general provision for peace, which is *pro forma* a part of every treaty, and can not be held to originate any right enforceable in any court of the United States.

(8) Even if the treaty creates a liability on the part of the contracting party who violates it, and even if such liability were enforceable in the courts of one of the par-

ties, it can not be enforced against one party in the absence of any proof that the treaty was broken by that party rather than by the other.

(9) A treaty which contains a general stipulation for peace, and also a provision that if depredations are committed money compensation is to be made on the failure, after a certain procedure has been followed, to deliver up the offender, creates no liability on the part of the tribe in cases where that mode has not been observed.

(10) When a claim is based upon a treaty which was broken by a war, the war having been terminated by a treaty in which no provision was made for the payment of indemnity by either party, such claim is waived by the fact of its omission from the later treaty, and the courts will not enforce it on the application of an individual claimant.

(11) Every statute creating an obligation for the payment of a claim for an Indian depredation has imposed the condition of amity with the tribe committing the depredation as a condition precedent to the liability. It is therefore necessary to show amity in every claim, without exception, which arises out of Indian depredations, and no matter whether or not the jurisdiction conferred by the act of 1891 on the Court of Claims was distinct and separate for the classes of claims, the want of amity of the tribe is a complete defense in all cases where it can be shown. Such being the conditions here, the Bannocks are not liable.

(12) It is not the general policy of Governments to pay for property destroyed in war, and in this respect the

policy of the United States has been, in accord with the general course of all nations, not to reimburse the citizen for damages inflicted by the public enemy. The constitutional power of Congress to provide for the payment of claims for damage done by the public enemy in time of war has been doubted so often, it is now the settled rule not to depart from this policy by the United States; and in construing the act of 1891 and the intentions of the lawmakers the court should look to this policy unless the language of the statute unmistakably points to an intention to adopt a different rule.

(13) The preference shown to cases which had been presented promptly to the Interior Department and there prosecuted to a final allowance was partly a reward for the diligence shown by the claimant and partly in the interest of compromising such cases on the low award of the Secretary without further expense for litigation, and was in no degree an indication that the construction placed upon the old law by the Secretary of the Interior was to be deemed final and binding upon this court in all such cases.

(14) In cases of ambiguity or doubt this court would be bound by a long-continued departmental construction of the *same* statute. It is not so bound in any case, however, by such departmental construction of a *previous* statute; and where there is no ambiguity, and the construction by the Department was clearly wrong, the court is not bound by such construction, whether of the same or of a previous statute.

(15) Congress can not be presumed to have ratified the departmental construction of the act of March 3, 1885, by its transfer of the jurisdiction there authorized to the Court of Claims. It was the jurisdiction authorized, not the jurisdiction taken, which was transferred. The doctrine of ratification by reenactment does not extend to departmental construction.

(16) The liability of the United States is a conditional liability in all cases and secondary to Indian liability. In this case there was no previous promise of the Government to pay if the Indian annuities were insufficient. The Bannocks being in arms against the United States at the time of the losses disclosed, the United States are not liable, and as there is no primary Indian liability, the judgment of the court below should be affirmed as to both defendants.

CHARLES B. HOWRY,
Assistant Attorney-General.

APPENDIX.

GENERAL LEGISLATION ON CLAIMS FOR DEPREDATIONS COMMITTED BY INDIANS.

A.

I.—ACT OF MAY 19, 1796, SEC. 14 (1 STAT. L., 472).

And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other persons as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other persons authorized, as aforesaid, to make return of his doings to the President

of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury. And, in the meantime, in respect to the property so taken, stolen or destroyed, the United States guarantee to the party injured an eventual indemnification; *Provided always*, That if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification; *And provided also*, That nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any State or district, of any Indian having so offended: *And provided further*, That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed, by any such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

B.

II.—ACT OF MARCH 3, 1799, SEC. 14 (1 STAT. L., 747).

And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any State or Territory inhabited by citizens of the United States, and there take, steal or destroy any horse, or horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the

President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong for satisfaction, and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury; and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided always*, That if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any State or district, of any Indian having so offended: *And provided further*, That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by any such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

C.

III.—ACT OF MARCH 30, 1802, SEC. 14 (2 STAT. L., 143).

And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United

States, shall come over or cross the said boundary line, into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the Territorial districts of the United States, or shall commit any murder, violence, or outrage upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose, who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction, and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent or other person, authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury; and in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided always*, That if such injured party, his representative, attorney, or agent shall in any way violate any of the provisions of this act by seeking or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any State or district, of any Indian having so offended: *And further provided*, That it shall be lawful

for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

D.

IV.—ACT OF JUNE 30, 1834, SEC. 17 (4 STAT. L., 731).

And be it further enacted, That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or subagent to make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking or attempting to obtain, private satisfaction or revenge, he shall

forfeit all claim upon the United States for such indemnification: *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the Treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

E.

V.—ACT OF FEBRUARY 28, 1859, SEC. 8 (11 STAT. L., 401).

And be it further enacted, That so much of the act entitled "An act to regulate trade and intercourse with the Indian tribes, and preserve peace on the frontiers," approved June thirtieth, eighteen hundred and thirty-four, as provides that the United States shall make indemnification out of the Treasury for property taken or destroyed in certain cases, by Indians trespassing on white men as described in the said act, be, and the same is hereby, repealed: *Provided, however*, That nothing herein contained shall be so construed as to impair or destroy the obligation of the Indians to make indemnification out of the annuities as prescribed in said act.

F.

VI.—JOINT RESOLUTION OF JUNE 25, 1860 (12 STAT. L., 120).

That the repeal *of* [by] the eighth section of the act of Congress, approved the twenty-eighth day of February, eighteen hundred and fifty-nine, of so much of the act of

Congress entitled "An act to regulate trade and intercourse with Indian tribes, and to preserve peace on the frontiers," approved June thirtieth, eighteen hundred and thirty-four, as provides that the United States shall make indemnification out of the Treasury for property taken or destroyed in certain cases by Indians trespassing on white men, as described in said act, shall not be construed to destroy or impair any right to indemnity which existed at the date of said repeal.

G.

VII.—ACT OF JULY 15, 1870, SEC. 4 (16 STAT. L., 360). SEC. 2098, REVISED STATUTES.

And be it further enacted, That no part of the moneys appropriated by this act, or which may hereafter be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses of the Indian department, to pay annuities due to or to be used and expended for the care and benefit of any tribe or tribes of Indians named herein, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof; and no claims for Indian depredations shall hereafter be paid until Congress shall make special appropriation therefor; and all acts and parts of acts inconsistent herewith are hereby repealed.

H.

VIII.—ACT OF MAY 29, 1872, SEC. 7 (17 STAT. L., 190). SECS. 445 AND 466, REVISED STATUTES.

That it shall be the duty of the Secretary of the Interior to *to* prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing

laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented, subject to the rules and regulations prepared by him, and report to Congress, at each session thereof, the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided*, That no payment on account of said claims shall be made without a specific appropriation therefor by Congress.

I.

IX.—SECTION 2156, REVISED STATUTES.

If any Indian belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury.

J.

X.—ACT OF MARCH 3, 1885 (23 STAT. L., 376).

INDIAN DEPREDATION CLAIMS.

For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending but not yet examined, on behalf of citizens of the United States, on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, with a reference to the date and clause of the treaty creating the obligation for payment, to be made and presented to Congress at its next regular session; and the Secretary is authorized and empowered, before making such report, to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid, and by what tribe such depredations were committed; and his report shall include his determination upon each claim, together with the names and residences of witnesses and the testimony of each, and also what funds are now existing or to be derived by reason of treaty or other obligation, out of which the same should be paid.

K.

XI.—ACT OF MAY 15, 1886 (24 STAT. L., 44).

Indian depredation claims: For continuing the investigation and examination of certain Indian depredation claims, originally authorized and in the manner therein provided for by the Indian appropriation act, approved March third, eighteen hundred and eighty-five, twenty thousand dollars; and the examination and report shall include claims, if any, barred by statute, such fact to be stated in the report; and all claims whose examination shall be completed by January first, eighteen hundred and eighty-seven, shall then be reported to Congress with the opinions and conclusions of the Commissioner of Indian Affairs and the Secretary of Interior upon all material facts, and all the evidence and papers pertaining thereto.

L.

XII.—ACT OF MARCH 2, 1887 (24 STAT. L., 464.)

Indian depredation claims: For continuing the investigation and examination of certain Indian depredation claims originally authorized, and in the manner therein provided for, by the Indian appropriation act approved March third, eighteen hundred and eighty-five, twenty thousand dollars;

And the examination and report shall include claims, if any, barred by statute, such fact to be stated in the report;

And all claims whose examination shall be completed by January first, eighteen hundred and eighty-eight, shall then be reported to Congress, with the opinions and conclusions of the Commissioner of Indian Affairs and the Secretary of the Interior upon all material facts, and all the evidence and papers pertaining thereto.

M.

XIII.—ACT OF JUNE 29, 1888 (25 STAT. L., 234.)

For continuing the investigation and examination of certain Indian depredation claims, originally authorized, and in the manner therein provided for, by the Indian appropriation acts approved March third, eighteen hundred and eighty-five, and March second, eighteen hundred and eighty-seven, twenty thousand dollars.

N AND O.

This is repeated in the same words by 1889, March 2, ch. 412 (25 Stat. L., 998); 1890, Aug. 19, ch. 807 (26 Stat. L., 356); and 1891, March 3, ch. 543 (26 Stat. L., 1009).

XIV.—ACT OF MARCH 3, 1891 (1 SUPPLEMENT TO R. S., 2D ED., P. 913).

Be it enacted, etc., That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department; and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations

with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject however to the limitations hereinafter provided.

Third. All just offsets and counter claims to any claim of either of the preceding classes which may be before such court for determination.

SEC. 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government:

Provided, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein:

And provided further, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred:

And provided further, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof.

SEC. 3. That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or bands of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost

or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law.

SEC. 4. The service of the petition shall be made upon the Attorney-General of the United States in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney-General of the United States to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government and the Indians, and to file a notice of any counterclaim, set off, claim of damages, demand, or defense whatsoever of the Government or of the Indians in the premises:

Provided, That should the Attorney-General neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court:

Provided, That any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the Commissioner of Indian Affairs, if he or they shall choose so to do.

In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file

in the Departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence, and such weight given thereto as in its judgment is right and proper:

Provided, That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such court.

And judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs:

Provided, That the party electing to reopen the case shall assume the burden of proof.

SEC. 5. That the said court shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides when the same can be conveniently done,

And no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government;

That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or

other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified.

SEC. 6. That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner:

First, from annuities due said tribe from the United States;

Second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise;

Third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence, and education;

And, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States:

Provided, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

SEC. 7. That all judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided.

SEC. 8. That immediately after the beginning of each session of Congress the Attorney-General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this

act, in favor of the claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill.

SEC. 9. That all sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of decedent's estates, and all contracts heretofore made for fees and allowances to claimant's attorneys are hereby declared void,

And all warrants issued by the Secretary of the Treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors or administrators or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof;

But in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court.

SEC. 10. That the claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceeding brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases.

SEC. 11. That all papers, reports, evidence, records and proceedings now on file or of record in any of the departments, or the office of the Secretary of the Senate, or the office of the Clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the Attorney-General.

SEC. 12. To facilitate the speedy disposition of the cases herein provided for, in said Court of Claims, there shall be appointed, in the manner prescribed by law for the appointment of Assistant Attorney-Generals, one additional Assistant Attorney-General of the United States, who shall receive a salary of twenty-five hundred dollars per annum.

(Amended by raising salary and grade the same as other Assistant Attorneys-General in the Department of Justice.)

SEC. 13. That the investigation and examinations, under the provisions of the acts of Congress heretofore in force, of Indian depredation claims shall cease upon the taking effect of this act, and the unexpended balance of the appropriation therefor shall be covered into the Treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the Interior Department, pending the transfer of said claims and business to the court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto.

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